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THE JUDICIAL PRACTICE

OF

SOUTH AFRICA.

Arnold. W. Hodson.

THE THEORY

OF THE

JUDICIAL PRACTICE

OF THE

COLONY OF THE CAPE OF GOOD HOPE,

AND

OF SOUTH AFRICA GENERALLY,

WITH SUITABLE AND COPIOUS

PRACTICAL FORMS

SUBJOINED TO AND ILLUSTRATING THE PRACTICE OF THE SEVERAL SUBJECTS TREATED OF.

BY

C. H. VAN ZYL,

ATTORNEY-AT-LAW, NOTARY PUBLIC, AND CONVEYANCER; AND FORMERLY LAW LECTURER AT THE SOUTH AFRICAN COLLEGE, CAPETOWN.

SECOND EDITION.

(IMPROVED AND VERY MUCH ENLARGED.)

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TO

THE RIGHT HONOURABLE

SIR JOHN HENRY DE VILLIERS, K.C.M.G.,

CHIEF JUSTICE

OF THE

COLONY OF THE CAPE OF GOOD HOPE,

AS A

TRIBUTE OF PERSONAL RESPECT,

AND A

TESTIMONY TO THE SOUND LEARNING, UNWEARIED DILIGENCE, JUDICIAL DIGNITY, AND EMINENT ABILITY WHICH HE HAS DISPLAYED IN HIS PRESIDENCY DURING TWENTY-NINE YEARS OVER THE JUSTICIARY OF THE COLONY:

AND

WITH A HOPE THAT HE MAY LONG CONTINUE TO FILL THE CHIEF SEAT ON THE BENCH OF WHICH HE IS SO DISTINGUISHED AN ORNAMENT:

THIS BOOK

IS

(BY PERMISSION)

RESPECTFULLY DEDICATED

BY

THE AUTHOR.

NOTICE TO THE SECOND EDITION.

SINCE the First Edition of this work many cases have been decided, and a few changes made by Acts of Parliament, affecting directly or indirectly the law and practice relating to the subjects treated of in this book. *I have noted all these up to date.* A few doubtful expressions have been revised, and the work has otherwise been improved and considerably enlarged. Chapters 41 to the end of the book are entirely new matter.

The chapter on "Costs," which appeared in pamphlet form in 1882, is now added. Very many decisions on the question of "Costs" and "Taxation of Costs" have since been given. The gist of these decisions is also here given, as they are not reported in the *Law Reports.*

From numerous letters received from time to time, many being from persons I am not acquainted with, I am satisfied that, with all its defects, the First Edition has answered the purpose intended, *viz.*—as a handbook for the busy practitioner, the articled clerk, and the student for the practical examination for the admission of attorneys.

It has also been of much use to the Legal branch of the Civil Service, and has also considerably helped candidates for some of the law examinations of the University.

It is hoped that, with the additions now made, and with a full and convenient Index, the utility of the work will have been much increased.

C. H. VAN ZYL.

1st August, 1902.

PREFATORY REMARKS TO THE FIRST EDITION.

1. WE have the Roman Dutch Law, as it was in Holland at the time of the Capitulation of this Colony to England in 1806, in force here, subject to changes made by us since, or to modifications introduced by local customs. In the case of Seaville *vs.* Colley (9 J., 39), the Chief Justice said: ". . . . They" (the body of laws introduced from Holland before 1806) "are not all to be found in any code or authentic document, to which easy reference can be made, and it is often only through a judicial decision upon a disputed question of law that the Legislature becomes aware of the existence of a particular law. The conclusion at which I have arrived as to the obligatory nature of the body of laws in force in this Colony at the date of the British Occupation in 1806 may be briefly stated. The presumption is that every one of these laws, if not repealed by the local Legislature, is still in force. This presumption will not however prevail in regard to any rule of law which is inconsistent with South African usages. The best proof of such usage is furnished by unoverruled judicial decisions. In the absence of such decisions, the Court may take judicial notice of any general custom, which is not only well established but reasonable in itself. Any Dutch law, which is inconsistent with such well-established and reasonable custom, and has not, although relating to matters of frequent occurrence, been distinctly recognized and acted upon by the Supreme Court, may fairly be held to have been abrogated by disuse. . . ." We have made comparatively few changes in the general

principles of the law, affecting Judicial Practice, and therefore the law of Holland on this subject still serves as our guide, not only in this Colony, but also in the neighbouring Colonies and Republics, and indeed throughout South Africa.

2. Though many excellent works on the Theory of the Judicial Practice have been published in Holland in the 16th, 17th, and 18th centuries, there is not one of them which, when translated, could be used as a whole to advantage for present day Colonial purposes; because, while some writers treat some subjects in full, they pass over other subjects by a very scanty reference, or at any rate with insufficient treatment; while again many subjects treated of by some of these writers have become obsolete, even in Holland, or were purely of local application. We have consequently to gather our information disjointedly from several writers. Having regard therefore to our local changes, either made expressly, or adopted in practice, which adoption again in some cases can be traced to the English law and practice, and to the decisions and practice from time to time of the Supreme Court on certain points; and also to the fact that no book on the subject has ever appeared in the English language, as far as I have been able to ascertain, though there are many Colonies and Countries where the Roman Dutch Law is practised, the time seems to have arrived for the compilation of a work, which shall present in an easily accessible form points of the most constant practical recurrence in the profession, so as to facilitate the enquiry of the practitioner.

3. Feeling the want of some such handy reference when I commenced practising, I began to make notes on the various subjects, simply for my own guidance and information; but afterwards, I dictated them to my own clerks, and later on, from time to time, to other articled clerks and law students. As this was becoming monotonous, and was sometimes also very inconvenient, I was induced to send some of these notes to the *Cape Law Journal* for publication; but that journal appearing only quarterly, it would yet take several years before the whole of them could be printed. Accordingly many members of the profession, especially

former pupils of mine, have urged upon me to publish the greater part, if not the whole, of my notes, in book-form. About half of them have already appeared in the *Law Journal;* but those as well as others, now for the first time published, have from time to time undergone excisions and additions, so as to keep every point of consequence well up to date. The law and practice therefore as far as I understand them, and as set forth in this book, may be said to be such as were in force in our Supreme Court on the 1st instant.

Some of the chapters on other subjects are not now published, as it was thought necessary, in order to keep down the size and the expense of the book, to publish only those subjects of more immediate and daily requirements.

4. In 1882 I published in pamphlet form the chapter on "Costs," which was the last then dictated to the articled clerks, as a handy work on the subject was then very much wanted. Since then our Supreme Court has decided some important cases on *Liens* and on the *jus retentionis.* The effect of some of these decisions is, that an Attorney's lien on, and his right of retention of, documents in his possession is not so extensive as I had stated, and to this extent, and on this point only, I amend that chapter. These decisions are referred to, and the law on the subject given, in the chapter herein on Hypothecations and Liens, etc.

5. The addition of the Practical Forms to each subject is a novelty in a work of this kind. Some theoretical writers do not touch on "Forms," believing them unnecessary, while others think they should be learned in an office. My experience does not permit me to concur, in full, with either of these views. It is sometimes difficult for a young student to grasp and remember the Theory, unless its exposition is shown by practical illustrations, and it is impossible, in many cases, for a busy practitioner to find the time to teach the use of Forms, and to shew when they are applicable and suitable, and when not. Merely to follow a Form, because it has been used by some one without being objected to, and without shewing whether it complies with the requirements of the Theory, is as unsatisfactory as the use of the Theory, without shewing its practical operation, and the consequence not unfrequently

has been a disappointment. With the aid here given, I know that the articled clerk or the practitioner welcomes the Forms. To the former, they inspire a safe hope like that of a sheet anchor: to the latter, they save trouble and delay: while to every one they serve as a guide to uniformity and simplicity in legal business. "Forms" have, at one time at least, played a very important part in legal history. Long before jurisprudents began to advise and to argue cases the practice and the use of "Forms" were in existence. The *Dies Fasti* and the *Dies Nefasti*, the Lawful and Unlawful days, when legal proceedings might be taken or not in Ancient Rome, were originally kept secret by the Patricians, so as to prevent the Plebeians from obtaining a remedy; and so also the slightest departure from or variation of the secret "Forms," then in use by the Patricians, was fatal to an action. Cnœius Flavius, clerk to Appius Claudius Cœcus, in 304 B.C., stole from him a collection of "Legal Forms" together with a calendar of the days when it was lawful to conduct legal business, and published them. This boon (theft therefore for once in legal history having been a direct public blessing) assisted the Plebeians materially in their procedure. But the Patricians, being jealous and disappointed at the exposure of Flavius, resorted to other secret Forms, to the detriment of the Plebeians, until afterwards Sextus Aelius, in 200 B.C., published a fresh collection, including that of Flavius. This was known as the "Jus Aelianum," and these "Legal Forms" were called "Leges Actiones," because they were said, in a certain arbitrary way, to be based on the first two of the Twelve Tables. This Aelian compilation was afterwards followed by all without further attempts at evasion or exclusive dealing on the part of the Patricians.

6. The "Forms" in this book, with three or four exceptions which are copied from the Rules of Court and the Insolvent Schedules, are what I have drafted for my own purpose, and have been actually used by me in practice, with few exceptions. These few exceptions are on points which have not yet arisen in the Supreme Court, but which may at any time arise; and are here given, as an illustration of the practical operation of the points in question.

These Forms are suitable to all the Courts in the Colony, and even if in a few instances some might be a little contracted, according to the particular circumstances of the case, care should be taken that in curtailment their essential requirements should not be omitted.

7. In a few of the subjects treated of a skeleton outline is given of their historical origin. This is done, in some cases, by way of explanation and information, or, in other cases, by way of making the subject more interesting and attractive to the student. In either instance, it is done with the object of shewing the sources, or origin, whence the information is derived, so as to enable those who are so disposed to follow up and complete their investigations on the historical aspect of the subject.

8. Occasionally, on some points, a statement is made as to the law of another country. This is also partly to shew the historical sources, and partly to shew the contrast to our own law in similar cases.

Another reason for the reference to the law of other countries is, because, though the general principle of our law is that of the Roman-Dutch Law, on many questions where this law has made no change on the Roman Law, we quote direct from the latter; and on some points, the principles of the English Law have been adopted by our Legislature, while practice has introduced a few other points. It is thus no unfrequent occurrence in our Supreme Court that in support of a point the Roman Law, the Roman-Dutch Law, and the English Law are quoted.

These divers sources and systems may at first sight seem embarrassing to a student, but he soon gets to know which to follow in any particular case, and by the means here stated his attention is drawn to the different systems, by pointing out where they differ or resemble, so as to enable him to make comparisons, and thus take a deeper interest in his work.

The rule for ascertaining which law is applicable to a particular case is stated by Van der Linden in his Laws of Holland (1. 1. 4): "In order to answer the question, What is the law in such and such a case? we must first inquire whether any *general law of the land*, or any *local ordinance* having the

force of law, or any well-established *custom* can be found affecting it. The Roman law, as a model of wisdom and equity, is, in default of such a law, accepted by us through custom in order to supply this want. The States of Holland express themselves very clearly in a certain Resolution of the 25th of May, 1735, in these terms:

"That the High Court, as well as all the Judges in the Province of Holland and West Friesland, must do justice according to the laws and ordinances of the land, according to the privileges and well-established customs and usages, and in default of these according to the written law" (the Roman law).

"The use of the laws of neighbouring nations is a means which, although not to be entirely rejected, should be resorted to with the greatest caution, and never but in such cases in which we feel perfectly convinced that the law of the neighbouring country and our own agree in this point in analogy." (Consult also V. d. Keessel, Thes. 5–26.)

9. This work is by no means exhaustive of the subjects of which it treats, and I must therefore leave the energetic student to pursue the investigations further. While in class-work one can conveniently and with advantage enlarge upon each subject, it is not desirable to make a work of this kind more elaborate than is necessary for the more immediate and daily professional requirements.

10. No one can be more conscious than myself of the defects of this work. But with all its faults I believe it will be of considerable aid to those for whom it is intended, viz., the Articled Clerks, the busy Practitioner, and the Students who are working for their Practical Examinations for admission as Attorneys. To expect a work of this kind to be free from faults, especially such as are incidental to a first edition, is more than I could venture to hope. But I have spared neither time nor trouble to make it in all respects as accurate, simple, brief, and serviceable as possible.

Throughout this work wherever the words "Chief Justice" occur, unless otherwise expressly defined, they refer to the present Chief Justice, Sir J. HENRY DE VILLIERS.

C. H. VAN ZYL

CAPE TOWN, *February*, 1893.

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Bort, Van Arresten	Bort.
Brouwer, de Jure Connubiorum	Brouwer.
Bynkershoek, Quaestiones Juris Privati	Bynkershoek.
Carpsovius, Lyfstraffelyke Misdaden	Carpsovius.
Cau, Groot Placaat Boek	G. P. B.
Christinæus, Decisiones	Christinæus.
Coren, Observationes	Coren.
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De Hollandsche Consultatien	Hol. Con.
De Regtsgeleerde Observatien	Regts. Ob.
Gaill, Practicarum Observationes	Gaill.
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THE

JUDICIAL PRACTICE OF SOUTH AFRICA.

CHAPTER I.

ON THE COMMENCEMENT OF AN ACTION IN GENERAL.

PROFESSOR GOUDSMIDT, in his *Pandekten-Systeem*, § 87, says :—

"An action is the legal means by which as plaintiffs we invoke the intervention of the Judge against a particular person, in order to force him to respect our legal position and to redress, when necessary, the wrong which he has committed."

In all judicial proceedings it is of the utmost importance at the outset to know who are the parties to sue, and who to be sued; whether the proceedings should be in your own name or in your representative capacity; and whether alone or by the assistance of another.[1]

In all personal actions, as a general rule, the defendant can be sued only before his own proper *forum*, that is, before the Court which has jurisdiction over him. The rule is *actor sequitur forum rei*,[2] but in real actions he may be sued also at the *forum* where he has immovable property situated, if he is himself not within that jurisdiction; and the plaintiff's preliminary proceeding then is to arrest the landed property

[1] Faure, "*Procesrecht*," Vol. I., Ch. 4.

[2] Wassenaar, I., I., § 3, and Groot Placaat Boek, Vol. 2, p. 754, § 220.

in order to found jurisdiction.[1] The Supreme Court has jurisdiction over the whole Colony; the other Courts in their respective Provinces or districts only; and having this jurisdiction it seems superfluous to arrest the landed property *in order to found jurisdiction;* but this is an old legal phrase, the practical object of which, in this instance, is to lay an attachment on the landed property to prevent the registered owner from parting with it, or mortgaging it, without the leave of the Court, on notice to the plaintiff. This "founding of jurisdiction," *ad fundandam jurisdictionem*, applies also to movables within the jurisdiction of the Court, if the defendant is out of it, by the Sheriff, or some other person, on the order of the Court taking and retaining possession of them.

A plaintiff suing a defendant in the latter's *forum* is bound by the law of that Court. Thus, for instance, if a debt contracted in a country where both parties at the time were domiciled which does not become prescribed in that country until after the lapse of a third of a century, but which if contracted in the country where the defendant subsequently becomes domiciled would be prescribed in eight years, the plaintiff sues the defendant in the latter's country, the Court must apply the prescriptive period in force there, as the law of the *forum* is the guide to the Court.[2] What a plaintiff should do under such circumstances is, out of his own Court where the debt was contracted, to sue the defendant by Edictal Citation, and if the judgment is not satisfied in that country, then to sue the defendant on it by way of provisional sentence in the latter's country. No prescription of eight years can then be pleaded.

Before we can institute or defend an action we must have the *legitima persona standi in judicio;* in other words, the legal right, whether as plaintiff or defendant, to bring or to defend any judicial proceeding in our own name, without the assistance or intervention of any other party.[3]

A person may cede to another his right of action,

[1] See Chapters "*Arrests*" and "*Edictal Process*;" and also Wassenaar, I., I., §§ 4 and 5.

[2] *Alexander* vs. *Parker*, decided in Supreme Court, 1902, not reported.

[3] Faure, "*Procesrecht*," Vol. I., Ch. 2.

completing it by delivery of the thing, if there is anything to be delivered, and of the instrument of cession.[1]

Before issuing summons the plaintiff should first have a demand made on the defendant; for if it be in the latter's power to comply with it, he should have an opportunity of doing so without being put to expense. If no demand is made, and the defendant offers to comply with the summons upon the service thereof, or within a reasonable time thereafter, and before the plaintiff could proceed further, he is entitled to his costs from the plaintiff for opposition.[2] Of course, if the defendant does not offer to comply with the summons, and proceeds to defend the action, he has not this right.

This demand is not necessary in reference to debts which are payable on a specified day, such as, for instance, most liquid debts, and where the rule is *dies interpellat pro homine*,[3] though in practice, with us, it is frequently made.

Persons disqualified from suing or defending, and who have not the *legitima persona standi in judicio*, are:

(*a*) *Minors.*—No minors, or persons under the power of guardians or curators, can institute or defend an action. If, therefore, an action is necessary to be brought or resisted on their behalf, it should be done in the name of their guardian or curator. A minor who has no guardian must have a *curator ad litem* appointed,[4] who is to sue or be sued in the particular action pending. In a criminal case against the minor he cannot be represented by his guardian or curator, for then the action is personal, and the rule is "that minors in cases of crime must appear personally *in judicio*."[5]

(*b*) *Madmen or insane persons.*—A madman or an insane person, though above the age of majority, must also sue or be sued in the name of his curator. If he has not one, the Court will appoint him one on the petition of anyone interested.[6]

[1] *Mills & Sons* vs. *Benjamin's Trustees*, B. for 1876, p. 115.

[2] See Chapter on "*Costs*," and also W. Grotius' Isagoge, by de Pape, I., 4, 6; Merula, 4, 21, § 1, and *Redelinghuys & Wessels*, 3 J., 250.

[3] Judicieel Praktyk, I., I., 8, § 8, and *Faure* vs. *Wright*, 1 M., 21.

[4] See Chapter "*Curator ad litem*."

[5] Grotius, I., 4, § 1; Voet, tr. by Sampson, 4. 4.

[6] See Chapter "*De Lunatico Inquirendo*."

(*c*) *Married women.*—A married woman, as a general rule, cannot institute or defend an action in her own name.[1] Proceedings should therefore be taken either in the name of her husband, or she should be duly assisted by him.[2] But to this rule there is the following exception[3]:—A woman who wishes to sue her husband for divorce or judicial separation, or maintenance, can do so without his consent or assistance, and so also can she defend, in her own name, an action instituted against her for divorce or for separation.

Though in Holland, and formerly also with us, a woman who carried on a public trade or business, with the knowledge or consent of her husband, could sue or defend, in matters concerning that business, without the authority of her husband; and also a woman who, by her ante-nuptial contract, had reserved to herself the free administration of her own estate, could on that account act without the assistance of her husband,[4] yet the practice of our Supreme Court for the last 60 or 70 years has been that a wife, though she is a public trader, or is married out of community of property, in bringing or defending an action (except an action against or at the suit of her husband) should be assisted by her husband; and that in serving a summons on her a copy thereof should also be served on him.[5] The apparent object of this is, that there should be proof that the husband has knowledge of the action, and that he consents to his wife's proceedings. The "assistance" consists in his joining his wife in signing the power to bring or to defend the action. But if he declines to assist his wife, or cannot consent, as, for instance, when he is insane, or is out of the way and cannot be found, or cannot easily be communicated with, then the wife has to petition the Court for the benefit of the *venia agendi*, that is, for leave to sue or defend, as the case may be, without the assistance of her husband; or the Court may appoint her a *curator ad litem* for that purpose; but this latter alternative

[1] V. d. Keessel, 95.

[2] See also *Michler* vs. *Saunders*, 4 C. T., 38; *Clark* vs. *Johnson*, Ibid. 428.

[3] Regtsgeleerde Observatien, Vol. 4, obs. 7.

[4] Grotius, I., 5, § 23.

[5] *Prince q.q. Dideman* vs. *Anderson and others*, 1 M., 176; and *Landsberg* vs. *Marchand*, Ibid. 200, and several subsequent cases.

is never applied for nowadays, as the Court always grants her prayer to sue without such assistance. The granting or withholding of such an order is entirely in the discretion of the Court.[1]

Though a notarial deed of separation is effectual between spouses, yet formerly neither could sue the other to carry out its terms and conditions, but had to institute an action for a judicial separation, and, in doing so, also claim the fulfilment of the deed.[2] But in the case of *Rosenthal* vs. *Rosenthal*[3] the Court allowed the plaintiff to sue only for the fulfilment of the stipulations in the deed of separation; and this has been the practice since.[4]

An executor dative of a predeceased wife's estate is not considered to have sufficient *locus standi* to institute an action in his capacity as such to upset a will made by the surviving husband with a subsequent wife, though the husband's will interferes with the joint will made with his predeceased spouse; but any heir *ab intestato* of the husband may bring such an action.[5]

An executor who has not taken out letters of administration is not entitled to sue;[6] but in order to have a will declared void, the executor nominated in it may be sued, though he has not yet taken out letters of administration, as it is frequently advisable to have the legality of the will challenged before an appointment is made or expenses are incurred by virtue of it.[7]

A person suing or defending in his representative capacity must be distinctly described as such; otherwise any appendage to his name, such as his title, trade, business, or occupation or profession, will be held as merely descriptive of what he is, and not that he sues or defends in his capacity. For instance, "Command T. H., cashier of —— Bank," was

[1] Sampson's Voet, 5, 1, 14–19; Van Alphen, Vol. I., Verbaal 5, pp. 54 to 60; also R. O., Vol. 4, obs. 7; and consult also *Gray* vs. *Spingler*, 1 M., 201.

[2] *Ziedeman* vs. *Ziedeman*, 1 M., 238; and *re Van Reenen* vs. *Van Reenen*, decided in the Supreme Court in 1877, not reported.

[3] Decided in 1886, not reported.

[4] See Chapter "*Judicial Separation*."

[5] *Estate Meiring* vs. *Meiring*, decided in the Supreme Court in 1877, not reported.

[6] *Muter and Stone* vs. *Spangenberg*, 2 M., 457.

[7] *Van Reenen* vs. *Van Reenen*, in 1876, not reported.

held merely descriptive: he should have been summoned as T. H., "*in his capacity* as cashier of the —— Bank."[1] So also in the case of *Hoone* vs. *Balston*, who was described as the Resident Magistrate of F——, the Court held this merely *descriptive* of what the defendant was and not that he was sued *in his capacity* as Resident Magistrate.[2] The capacity in which a person sues or is sued must be proved. In the case of Executors of Estates or of Trustees of Insolvent Estates, certificates of their appointments are put in.[3] The Supreme Court has decided that when its Master sues sureties who had bound themselves for the due administration of an estate, the summons should be in the same form as in illiquid cases and not provisionally.[4]

An agent cannot sue or defend *in his name as agent* for his principal. He should produce his power to act, and by virtue of it sue or defend in his principal's name, which name should appear on the record; and though the summons should be directed against the principal, it may be served on the agent.[5]

A guardian who institutes or defends an action on behalf of his minor without the leave of the Court first obtained, does so at his own personal cost, if the result should be unsuccessful, unless where the Court is of opinion that it would have granted the leave if asked for in time.[6] But if an insolvent father sues on behalf of his minor child without the previous sanction of the Court, it is in the discretion of the Court to order him to give security for the result of the action.[7]

No action can be instituted against an officer of the Imperial Government in his official capacity without an order of His Majesty permitting it, as the Supreme Court has

[1] *Hudson* vs. *Cosens*, 1 M., 126.

[2] Decided in November, 1870, not reported.

[3] *Muter and Stone* vs. *Spangenberg*, quoted above, and *S.A. Association* vs. *Bosman*, 7 J., 9.

[4] *Master* vs. *Werner and Others*, 4 C. T., 418; *Ditto* vs. *Talbot's Sureties*, 6 C. T., 392.

[5] *Brink q.q. Breda* vs. *Voigt & Breda*, 1 M., 537; *Dickenson* vs. *Ley q.q. Van der Chys*, 2 M., 185, and several similar decisions in subsequent cases not reported.

[6] *Montmort* vs. *Board of Executors; Camphor's Curator* vs. *Marnitz*, 6 J., 118 & 95; *V. d. Walt* vs. *Hudson and Moore*, 4 J., 365.

[7] *Lange* vs. *Classe*, 3 C. T., 371.

otherwise no jurisdiction.[1] But there is nothing to prevent such an officer from suing without such leave.

No action can be brought against a Divisional Council or a Municipality in respect of damages sustained by reason of default or neglect of the Council or Municipality in connection with any matter relating to the state of the roads, bridges, or streets under its charge, unless within fourteen days of the happening of the event notice thereof shall have been given to such Council or Municipality. But a Superior Court may grant special leave to sue if they are satisfied that the Council or Municipality would in no way be prejudiced by reason of the delay.[2]

All actions against the Colonial Government must be brought in the Supreme Court unless the Government renounces its right and agrees to a case against it being tried in an inferior Court.[3]

The Governor cannot be sued, nor any of the Judges, without the leave of the Supreme Court first having been obtained,[4] but they may themselves sue without such leave.

No action can be brought against the Sheriff or his Deputy for anything done or omitted to be done in the execution of his office unless commenced within six calendar months after the act committed or omitted to be done.[5]

Nor can a Justice of the Peace be sued for any act done by him in the execution of his office until notice in writing has been given to him at least one calendar month before issuing the summons.[6]

Nor can an action be instituted against an Officer of the Customs for anything done by him in pursuance of any act relating to the Customs until one month's previous notice has been given him; and such action must be brought within three calendar months after the accruing of the cause thereof.[7] But if an Officer of Customs wishes to institute an action for condemnation of goods seized, he must commence proceedings within one month from the day of seizure,[8] and the person

[1] *Fraser* vs. *Sivewright*, 3 J., 55.
[2] Sect. 2 of Act 28 of 1894 and *Strydom* vs. *Divisional Council of Oudtshoorn*, 10 C. T., 187.
[3] *Clifton* vs. *Treasurer of the Colony*, 3 C. T., 376.
[4] Rule of Court 9.
[5] § 8 of Act 17 of 1886.
[6] § 5 of Ord. No. 32.
[7] §§ 68 and 69 of Act 10 of 1872.
[8] § 65.

whose goods have been seized shall not be allowed to defend the action unless he gives security for the costs in a sum not exceeding £100.[1]

A Committee, or Consistory, of the D. R. Church cannot sue or be sued as such; but the names of the members of the Committee, or Consistory, should be given.[2]

In the case of a public company carrying on business by virtue of a trust deed, it is generally provided in the deed who shall sue or be sued: if no such provision is made, then every member of the company must sue or be sued. So also in the case of a private company or an association (say, a boating-, football-, or cricket-club) if the articles of agreement make no provision as to the right to sue and be sued, then every member thereof must sue or be sued.[3]

A corporation may sue or defend in its corporate name where the Act constituting it has so enacted—as, for instance, the different Divisional Councils and Municipalities in this Colony; but where this right or privilege has not been expressly given by the legislature, though the corporation may have this right in the United Kingdom by virtue of an Act of the Imperial Parliament, it cannot sue or defend in this Colony in its corporate name, but must do so in the name of its manager.[4]

A cessionary of a fire policy, though only pledged as a collateral security for a bond, is the proper person to sue the company for the amount of the policy where the building has been destroyed by fire and his debt is still unpaid.[5]

If a guardian wants to bring an action against his ward, or the ward against his guardian, a *curator ad litem* must be appointed to the ward.

If a suitor dies pending an action, which is transmissible by his death, his executor must carry on the suit, and to do so he had formerly to obtain leave of the Court by petition, but of late years the practice has been for the executor to

[1] § 67. See also *Mirane* vs. *Collector of Customs*, decided in 1902, not reported, in which the Court ordered the applicant to give security for £100.

[2] *Daly* vs. *Dutch Reformed Church*, 7 J., 109.

[3] For analogy see *Burgers* vs. *Murray and others*, 1 R., pp. 218, 252, 258, and *Dell* vs. *Watson*, 1 G., 392.

[4] *Re Basson* vs. *The Standard Bank of Capetown*, decided in 1866, not reported.

[5] *Trautman* vs. *Imperial F. I. Co.*, 5 C. T., 68, and Ibid., 12 S. C., 38.

enter appearance with the Registrar of the Court without specially asking the Court for leave to continue the action. If, however, the opposite party objects to the executor entering appearance either because the action is not transmissible by death, or for any other good cause, then the executor should petition the Court for leave to carry on the suit; or if the executor declines to enter appearance, then the other party can petition the Court to compel him to do so.

But if, pending an action, a suitor's estate is sequestrated as insolvent, then if the action is one for personal damages, the insolvent may carry on the suit in his own name and for his own benefit;[1] but if otherwise, then the trustee must, after six weeks' notice to that effect, make his election to prosecute or discontinue the action.[2] If he elected to continue the action, he had formerly to apply, by suggestion, for substitution of his name on the record. No notice to the defendant of such application was necessary.[3] This application has of late years been made by petition, and on notice to the opposite side, instead of, as formerly, by suggestion from the bar, without notice. But if the insolvent is defendant in the action, then his trustee must be summoned to take up and defend the action.[4]

A *negotiorum gestor*, that is a person who, without mandate and in time of necessity, takes upon himself the care and management of the affairs of an absent person in order to protect him from loss, may also appear for his principal in prosecuting or defending actions;[5] and though in one instance, under the peculiar circumstance, the defendant was suffered to appear in Court without any order,[6] the correct practice is that he should petition for leave to appear as *negotiorum gestor*, or at any rate as a *curator ad litem*. But he is not entitled to costs of an unsuccessful action instituted by him and from which his principal has derived no benefit whatever.[7]

[1] § 24 of Insolvent Ordinance.
[2] Ibid.
[3] *Chase, Trustee of Stretch* vs. *Niekerk*, 3 M., 299.
[4] § 23 Insolvent Ordinance; see Chapter "*Trustees*."
[5] Voet, tr. by Buchanan, 3, 5; and Grotius, 3, 27.
[6] *Ryneveld* vs. *The Wine Depot*, 2 M., 185.
[7] *Prince q.q. Dieleman* vs. *Berrangé* alias *Anderson*; consult also *re Ebden*, decided in April, 1864, 1 R., 161.

Where a co-debtor is absent from the Colony the plaintiff is justified in suing the remainder for the whole debt; and so also where one of the partners of a firm is absent from the Colony the remainder may be sued for the whole debt. The liability or not of a co-debtor for the whole amount depends upon the nature of the obligation. As to the partnership debts while the business is still in existence in the Colony the firm is liable and the summonses for all partners whether present or absent are to be served at the place of business of the firm, and this is generally done.[1]

Any person who is not a party to an action and who can satisfy the Court that he has a reasonable interest in the result of the suit, may, with leave of the Court obtained on petition, and on notice to the other parties, interpose as a co-plaintiff, or a co-defendant, and declare or plead, as the case may be, with either of them or separately.[2]

From the most ancient period of the Roman law, adopted by the Roman-Dutch law, a person always had the right to sue for a civil remedy, though the defendant may have been convicted or not in a criminal case arising out of the same cause of complaint.[3] But the Supreme Court in 1829 held that the plaintiff could not bring both the civil and the criminal action; he must make his election.[4] These decisions were, however, reversed in 1875 in the case of *Mostert* vs. *Fuller*;[5] and a person may now bring both his civil and his criminal actions for the same cause of complaint either at the same time, or one after the other in whichever order he pleases, and whether he prosecutes privately or not. But if the nature of the civil proceedings against the defendant or the judgment thereon are likely to prejudice him in the eyes of the jury at a criminal trial arising out of the same charge against him, then the Court has the discretion either to stop the civil trial *sine die* or, hearing it, reserve judgment till the verdict in the criminal case shall have been given.

[1] *Alcock* vs. *Du Preez*, B. for 1875, p. 130; *Pienaar* vs. *Rattray*, 5 C. T., 67, and Ibid, 12 S. C., 35; and see Chapter "*Summonses*."

[2] Voet, tr. by Sampson, 5, 1, 34–38.

[3] Compare, by way of analogy, *Hare* vs. *Kotze*, 3 M., 472.

[4] *Rossouw* vs. *Sturt*, 1 M., 378; also *Danster* vs. *Le Roux*, in appeal from R. M. Court, Fraserburg, in 1870, not reported.

[5] B. for 1875, p. 23, and two or three subsequent cases.

A plaintiff domiciled in the Colony cannot be compelled to give security for the costs of the action, though he be ever so poor,[1] nor can a defendant be called upon to give security. But a non-resident plaintiff having no landed property in the Colony unmortgaged, or not of sufficient value over and above the mortgage, must give security for costs; and a non-resident defendant, who makes a claim in re-convention, must give security to answer the judgment and costs. So also an insolvent guardian who sues on behalf of his ward, without leave of the Court, must give security for costs; and a person who sues as a pauper, and wants to appeal, must give security for costs of appeal.[2]

Those who have not the means to bring or to defend an action will be allowed to do so *pro Deo*, or *in formâ pauperis*.[3]

If a judgment is "absolution from the instance," the plaintiff may begin his action *de novo*, after first paying the defendant the costs he may have been condemned to pay.

A defendant, however, may object to a decree of absolution from the instance, but he should do so at the time of judgment, if the evidence given at the trial is of such a nature as to entitle him to judgment in his favour.[4]

If the plaintiff fails to appear to prosecute his action on the day of trial, he will be considered in default, and the defendant can claim "comparuit" costs.[5]

When once a plaintiff has issued summons, he should proceed with his action by the term next after that in which the summons was issued, or, if issued out of term, then within the second term thereafter; otherwise the defendant can move the Court to have judgment signed against him.[6] But if he only pretends, or gives out, that he has an action against the defendant, and does not issue summons, then the latter can sue him for perpetual silence. In the former case the judgment takes the nature of one for "absolution from the instance;" in the latter it is final, and the plaintiff is for ever barred from proceeding with his action.[7]

[1] *Witham* vs. *Venables*, 1 M., 291.
[2] See Chapter "*Costs*."
[3] See Chapter "*In formâ pauperis*."
[4] *Corbridge* vs. *Welch*, 9 J., 277.
[5] See Chapter "*Comparuit*."
[6] See Rules of Court 25 and 330 of Tennant's Collection.
[7] See Chapter "*Perpetual Silence*."

When a final sentence has been given in a cause, neither party to it, nor either party's successors, can subsequently bring an action in respect of the same subject matter; and if he should do so the defendant can plead *res judicata*.[1] But this plea is of no avail in respect of a sentence of absolution from the instance.[2]

An action should be instituted within the time fixed by law, otherwise the plaintiff will be barred by prescription. The prescription is of different periods according to the nature of the debt, or other cause of the plaintiff's claim, or title of the action: for instance, an action for libel or slander becomes prescribed in a year and a day;[3] the *Redhibitoria* action, *i.e.*, for the secret defect of an animal or thing sold, in six months;[4] the *non numeratæ pecuniæ* action, in two years,[5] and numerous others which need not here be mentioned.

But when a General Bond has been passed to secure the amount of a promissory note on condition that the Bond shall be void on payment of the amount of the note, though the note may become prescribed and cannot be sued on, the Bond does not become prescribed under thirty years, and may be still sued on for payment of the amount.[6]

As a general rule an action, from the moment the right to it has accrued on the part of any person, passes to or against his heirs as the case may be. The exceptions are:—(*a*) In those cases in which the right to be protected ceases with the life of the deceased, as in the case of an action for personal damages, so long as *litis contestatio* has not taken place;[7] (*b*) In criminal actions; (*c*) In popular actions; (*d*) In private penal actions, or in those in which revenge is the sole object.[8]

As a general rule also an action is extinguished:—(*a*) By the death of one of the parties before citation is issued, except

[1] *Meyer* vs. *Low*, 2 M., 8; *Du Toit* vs. *Malherbe*, Ibid, 299; *Du Prez* vs. *Rose*, 3 M., 353; Grotius, 3, 49.

[2] *Grimwood* vs. *Balls*, 3 M., 448.

[3] Grotius, 3, 35, § 3; Van der Keessel, 200.

[4] Muhlenbruch Doct. Pand., Vol. 2, § 401.

[5] Just. Inst., 3, 21.

[6] *Peach & Co.* vs. *Simons' Trustee*, 13 S. C., 53.

[7] *Executors of Meyer* vs. *Gericke*, 1 F., 14.

[8] Thibaut's Systeem des Pandekten Rechts, tr. by Lindlay, § 71.

in those cases where the right passes to the heirs;[1] (*b*) By a concurrence of actions;[2] (*c*) By prescription.[3]

Prescription is interrupted:—(*a*) By the issuing of a summons, which should be followed up by the action within the time prescribed by the Rules of Court, in which case the interruption of the prescription will be counted from the date of the summons;[4] (*b*) By the recognition, express or tacit, of the debt by the debtor; as, for instance, the payment of some interest, however little, or however small a portion of the principal: these are regarded as modes of tacit recognition.[5]

Petition by a Wife married in community of property, but who is a public trader, for leave to defend an action without the assistance of her husband, who has refused to join in the defence.

To the Honourable the Judges
of the . . . . . Court of the
Colony of the Cape of Good Hope.

The petition of A. . . . B. . . . of . . . .

Humbly sheweth—

I. That your petitioner was married in community of property to C. . . . B. . . . at . . . . on the . . . . day of . . . .

II. That in or about the month of . . . . your petitioner, with the consent of her husband, opened, and has since carried on a . . . . business in . . . .

III. That in the course of such business she has from time to time bought goods from, and has had other dealings with, the firm of Messrs. . . . . of . . . .

IV. That the said firm has summoned your petitioner in the . . . . Court of . . . . for the sum of £ . . . . stg., for goods alleged to have been sold and delivered to her, but which she totally denies.

V. That she has applied to her husband to sign a power of attorney to join and assist her in defending the said action, but he has declined to do so.

VI. Wherefore your petitioner prays that your lordships may be pleased to allow her to defend the said action without a power to do so from her said husband and without his assistance.

And your petitioner as in duty bound will ever pray.

(Signed) A. . . . B. . . .

[1] Mer., 4, 24, 11, §§ 3 and 5; Goud. Pand., § 97, and *Meyer* vs. *Gericke*, quoted above.

[2] Goud., Ibid, § 98.

[3] V. d. Keessel, 206, 207, and 874; Act 6 of 1861, and *Van Schalkwyk* vs. *Hugo and another*, 1 F., 89.

[4] *Note.*—It is a popular error to suppose that prescription is interrupted by a lawyer's letter of demand.

[5] Goud. Pand., §§ 101 and 103.

Affidavit of Verification in support of petition.

In the . . . . Court of the
Colony of the Cape
of Good Hope.

In Re—The petition of A. . . . B. . . .

I, A. . . . B. . . . of . . . ., the within petitioner, make oath and say, that every allegation contained in the foregoing petition is true and correct.

(Signed) A. . . . B. . . .

Sworn at . . . . this . . . . day of . . . .
Before me . . . ., J.P.

NOTE.—*This short form of affidavit of verification of the allegations in a petition is now always accepted by the Court, instead of as formerly when every affidavit had to set out in full all the particulars of the petition* (*see Chapter* "Affidavits.") *The petition here mentioned may either be presented to the Court without previous notice to the husband, and a rule* nisi *then asked for; or a notice of motion may be served on the husband stating that, in terms of the prayer of the petition, of which a copy should at the same time be served on him, application will be made to the Court to allow the wife to defend the action in her own name without his assistance. The latter is the more expeditious and less expensive course to adopt if the husband can be served with the notice. If the wife is to be plaintiff, the same course may be adopted, as to serving notice of motion, if the husband can be reached, otherwise she must proceed upon the petition alone.*

Petition by a Wife married in Scotland to sue for libel without the assistance of her husband, who cannot be communicated with.

(Heading as before.)

I. That your petitioner was married to C. . . . D. . . ., on the . . . . day of . . . ., at . . . ., near Edinburgh, in Scotland, and thereafter came with him to this Colony, and took up his domicile at . . . . in . . . .

II. That her husband is at present on a trading expedition in the Northern parts of Great Namaqualand, and left for that purpose in the month of . . . ., and will not return for at least . . . . months; and that owing to the want of postal communication in those regions there is no, or very little, chance of a letter reaching him during his absence.

III. That from the letters hereunto annexed—written by Mrs. . . ., it will be seen that there are some very serious charges made against her character, which not only in her own but also in the interest of her husband and their children she is bound to take notice of, and to clear herself of.

IV. That therefore she intends to sue the said Mrs. . . . for damages for the false and malicious libel contained in the said letter, but that owing to her husband's absence as aforesaid, the difficulty of communicating with him, and the uncertainty of the date of his return, she is unable to begin the action without your lordships' permission.

V. Wherefore your petitioner prays that your lordships may be pleased to allow her to institute an action against the said Mrs. . . . for damages by reason of the libel aforesaid, without the power of attorney, or assistance, of her said husband.

And your petitioner as in duty bound will ever pray.

(*Affidavit of verification as before.*)

Petition of a Negotiorum Gestor for leave to defend an action.

(Heading.)

I. That A. . . . B. . . . is owner of the farm . . . . in the district of . . . . . and he resided there till on or about the . . . . day of . . . . when he left, as one of the burghers of the ward of . . . . in terms of certain Government orders, to join the expedition against . . . . one of the native tribes on the Eastern Frontier of the Colony.

II. That your petitioner owns and lives on an adjoining farm . . . . and has been a friend of the said A.B. for the last . . . . years.

III. That when the said A.B. left as aforesaid, his wife with two of his minor sons were left in charge of the said farm.

IV. That the wife died on or about the . . . . day of . . . . and the two sons who have been working the said farm are still minors, and aged respectively . . . . and . . . . years, and too young and inexperienced to represent their father's business.

V. That your petitioner, as neighbour and friend of the family of the said A.B., has taken care of the crops on the farm, and has had them reaped and stacked, and paid the workmen out of his own funds.

VI. That before so taking upon himself the management, without mandate, of the affairs of the said A.B., your petitioner endeavoured to communicate with him by telegraph for instructions, but was informed that as the said A.B. was one of the men elected to do special duty beyond the head-quarters of the camp at . . . . . there was no means of any telegram or letter reaching him, in the usual way, for several days, or perhaps even for weeks to come. Upon this, rather than see the crops destroyed, your petitioner took care of and gathered them for the benefit of the said A.B.

VII. That an interdict against the removal of the said crops from the stack, or farm, has been granted by the Hon. the . . . . Court, on the application of C.D., pending an action between him and the said A.B., as to an alleged sale thereof.

VIII. That your petitioner has full knowledge of the transactions between the said A.B. and the said C.D., and it is absolutely necessary, in the interest of the said A.B., that the said action should be defended, but that owing to the circumstances hereinbefore stated, it is impossible, for some time at least, to obtain the consent of the said A.B. thereto.

Wherefore your petitioner humbly prays that your lordships may be pleased to allow him, as *negotiorum gestor*, to defend the said action ; or, otherwise, to appoint him *curator ad litem* for that purpose.

And your petitioner, &c.

(*Affidavit of Verification.*)

Petition by an Executor to have his name placed on the record to continue an action begun by the deceased.

(Heading.)

The petition of A.B. of . . . .

Humbly sheweth—

1. That your petitioner is the executor testamentary of the estate of the late C.D. of . . . .

2. That in his lifetime the said C.D. had commenced an action in this Honourable Court against E.F. of . . . . to have the water rights on the farm . . . . in the district of . . . . declared between them; and that this action is still pending.

3. That the said C.D. died on the . . . . day of . . . .; and your petitioner, on the . . . . day of . . . . duly received letters of administration as executor of his estate; and it is necessary that your petitioner, as such executor, should have his name placed on the record and continue the action.

Wherefore your petitioner humbly prays that your lordships may be pleased to allow his name, as such executor as aforesaid, to be placed on the record for the purpose of continuing the action to its final termination.

And your petitioner, &c.

(*Affidavit of Verification.*)

NOTE.—*A similar petition is to be presented by a trustee of an insolvent estate to have his name placed on record in the place of the insolvent.*

Notice of motion to E.F. that the foregoing petition will be presented to Court.

In the Supreme Court, &c.

In re The estate of the late C.D. . . . . of . . . .

Sir, Take notice that in terms of the petition, of which a true copy is hereunto annexed, application will be made to the Honourable the Supreme Court on . . . . the . . . . day of . . . . at 10 o'clock a.m. by A.B. to have his name, in his capacity as executor testamentary of the said late C.D., placed on the record in the case now pending in this Court, wherein the said C.D. was plaintiff and E.F. is the defendant.

Dated at Cape Town this . . . . day of . . . .

Yours, &c.

. . . . . .

Executor's Attorney.

To . . . .

Attorney for E.F.

Notice of motion to an Executor who has neglected or refused to have his name placed on the record.

In the Supreme Court, &c.

Between A.B., applicant
And C.D. in his capacity as executor testamentary of the estate of the late E.F., respondent.

Sir, Be pleased to take notice that application will be made to this Honourable Court on . . . . the . . . . day of . . . at 10 o'clock a.m., at which time you will be required to shew cause, if any, why your name, in your capacity as executor testamentary of the estate of the late E.F., shall not be placed on the record as defendant in the cause now pending in this Honourable Court, wherein the said applicant is the plaintiff, and the said late E.F. was the defendant; and also to shew cause why you shall not be ordered to pay the costs of this application.

Dated at Cape Town this . . . . day of. . . .

Yours, &c.

. . . . . .

Applicant's Attorney.

To C.D. of . . . .
The above respondent.

Affidavit in support of the foregoing notice of motion.

(Heading as above.)

I, A.B., the above applicant, make oath and say:

1. That on the . . . . day of . . . . I commenced an action in this Honourable Court against E.F., since deceased, to (*state here the cause of the action, for instance*) compel him to remove certain fencing put up by him, without my knowledge or consent, on my farm "Taaiboschkloof," in the district of . . . . and also to close or fill up certain furrow made by him along the said fence.

2. That the said E.F. had entered appearance to defend the said action and had filed his pleas, but he died on the . . . . day of . . . .; and the said action is still pending.

3. That the said C.D. has been appointed executor testamentary of the late E.F., and, as such, has, on the . . . . day of . . . . , received letters of administration to administer the estate of the said late E.F.

4. That the said C.D., as such executor testamentary, has been called upon by letter (copy of which is hereunto annexed), either to settle the claim made on the said late E.F. or to have his name placed on the record as the defendant in the said cause; but that he has neglected, or failed, though a reasonable time has elapsed to enable him, if so disposed, to do so.

5. That, unless the said C.D. in his said capacity be ordered to have his name placed on the record as the defendant in the said action, I am unable to proceed with it to its final termination.

Sworn at . . . . (Signed) A.B.
&c.

Notice by a party to a suit calling upon another to intervene.

In the Supreme Court, &c.

Between A.B. and C.D., plaintiffs,
And E.F., G.H., and I.J., defendants.

Gentlemen, Be pleased to take notice that an action is now pending in the Honourable the . . . . Court between the above parties in which the plaintiffs claim (*here state cause of action, as for instance*) £1000 damages for unlawful diversion by the defendants or their servants, of the flow of the water of the . . . . river in the district of . . . . ; and for a declaration that they are entitled to all the water arising on the farm "Oliandria," and flowing into the said river across your farm "Beaconsfield," and the farm "Patatasfontein," belonging to the defendants, on to their farm "Oorlogspoort"; and that the said action is set down for trial for the . . . . day of . . . ., and that you are at liberty to intervene, if so advised, in said action, either as co-plaintiffs or co-defendants.

Dated at . . . . this day of . . . .

Yours, &c.,

. . . . . .

Plaintiffs' Attorney.

To Messrs. K.L. and M.N.
Beaconsfield,
District of . . . .

(*Affidavit of Service.*)

Petition to the Court for leave to intervene in an action as co-plaintiff.

(Heading.)

In the matter of A.B. *vs.* C.D.
The petition of E.F. of . . . .

Humbly sheweth—

1. That an action is pending in this Honourable Court between the above suitors for (*here state the cause of action, for instance*) a perpetual interdict restraining the defendant from erecting certain machinery on the banks of the river Tugela in the district of . . . . for wool-washing and a distillery.

2. That part of your petitioner's farm is bounded by the said river, and your petitioner has a right to water his cattle in the said river; that your petitioner also uses the water of the said river for the purpose of irrigating his orchard and vegetable garden.

3. That though the water for your petitioner's homestead and domestic purposes is derived from another source not now in question, your petitioner respectfully submits that he has a material interest in preventing the water of the Tugela river from being polluted.

4. That if the defendant be not restrained from erecting the machinery for the purposes he has in view, your petitioner fears that by allowing the water of the woolwashery and distillery being turned into the river, the

whole river may become so polluted as to make it unsafe to the health of man and beast.

Wherefore your petitioner humbly prays that your lordships may be pleased to allow him to intervene in the said action as a co-plaintiff.

And your petitioner, &c.

(*Affidavit of Verification.*)

Petition to intervene as co-defendant.

(Heading.)

A.B. *vs.* C.D. in his capacity as trustee of the insolvent estate of E.F.

. . . . . .

1. That an action is pending in this Honourable Court in which the defendant, in his said capacity, is sued for the sum of £100 stg. for an account alleged to be due to the plaintiff by the said estate for repairs to a house.

2. That on the . . . . day of . . . . your petitioner purchased the said house in question from the said insolvent estate for the sum of £ . . . ., on condition that the repairs which the said plaintiff had undertaken to do for the said estate should be completed by him at the expense of the said estate.

3. That the said plaintiff has so negligently and unskilfully performed his work that the house leaks as much as before; that two of the windows have been blown out by the last south-east wind, on the . . . . day of . . . .; and that a portion of a wall in the kitchen has tumbled in.

4. That your petitioner, as such purchaser as aforesaid, has an interest in seeing the work undertaken by the plaintiff done in a proper and workmanlike manner.

Wherefore your petitioner humbly prays that your lordships may be pleased to allow him to intervene in the said action as a co-defendant.

And your petitioner, &c.

(*Affidavit of Verification.*)

Notice to the other side by the party who wishes to intervene, either as co-plaintiff or as co-defendant.

(Heading of case.)

Sir, Be pleased to take notice that application will be made to the Honourable the . . . . Court on . . . . the . . . . day of . . . ., on behalf of E.F. in terms of the prayer of his petition, copy of which is hereunto annexed, for leave to intervene as co-plaintiff (*or co-defendant*) in the above case, at which time you are requested to shew cause, if any, to the contrary.

Dated at . . . . this . . . . day of . . . .

Yours, &c.

. . . . . .

Attorney for E.F.

To G.H.

Attorney for the defendants (or plaintiffs).

CHAPTER II.

"CURATOR AD LITEM."

IN the previous chapter it was indicated what class of persons require a *curator ad litem.* This chapter will treat only of curators to minors; in other chapters, under their proper headings, will be treated the case of others.

When a minor has no guardian and he is about to be engaged in a law-suit, he must have a *curator ad litem* appointed to him.[1]

Such curator is appointed by the Court upon the petition of the minor, or, if he is too young to understand it, of some relative or friend or some one who can shew a reasonable interest in him, setting forth that he has no guardian, and is about to institute, or defend, an action at law, and stating also briefly the nature of the case, and praying the Court to appoint a *curator ad litem* to represent him.

If any one wants to sue a minor, but the latter or his friends take no steps to have a *curator ad litem* appointed for him (when he has no guardian), then, upon the petition of the former, in similar form to that on behalf of a minor, the Court will appoint a *curator ad litem* to the minor, to defend the action.[2]

A minor may have a *curator ad litem* appointed for him even against his will, or without his knowledge, if it can be shewn to the Court that the application will be for his benefit and to his interest.[3]

[1] Jud. Prak., I., i., 8, §§ 2, 3, 4.

[2] *Botha* vs. *Botha*, decided February, 1890, not reported.

[3] Mer., 4, 40, 6, and the references there given.

The costs of appointing a *curator ad litem* to a minor are costs between party and party.[1]

A *curator ad litem* should have the *legitima persona standi in judicio*, and not be disqualified from suing or defending an action in his own private capacity.

A female cannot, as a rule, be appointed a *curator ad litem*, though she may in some cases have the *legitima persona standi in judicio*.[2]

As a general rule a near relative is appointed *curator ad litem*, but this is discretionary with the Court, and frequently the advocate or attorney employed for the minor has been appointed as such.

From the time of the appointment of the *curator ad litem*, the action is to be conducted in the name of the minor, duly assisted by his curator; for instance, if the minor is plaintiff, the summons should call upon the defendant to "render to him, A.B., the minor, duly assisted by his *curator ad litem*, C.D.;" and if he is the defendant, the summons should "command A.B., duly assisted by his *curator ad litem*, C.D."

The duty of a *curator ad litem* is to represent the minor in the particular case then pending, and to watch and protect his interest in the case as a good and prudent father would have done. Beyond what is embraced in the case he has nothing whatever to do with the minor's person or property, and his duties end with the completion and final settlement of the case.

A *curator ad litem* may be removed by the Court for the same reasons as an attorney employed in a case.[3] He may also resign his office, but it is in the discretion of the Court to accept or not to accept his resignation.

In case of the removal, death, or resignation of a *curator ad litem* the same proceedings as before must be taken for the appointment of another to fill his place.

The name of the person whom it is wished to have appointed as *curator ad litem* may either be mentioned in the petition or be mentioned to the Court by counsel.

[1] *Curator Camphor* vs. *Marnitz*, 6 J., 95.

[2] See Chapter "*De Lunatico Inquirendo*."

[3] Zutphen's Nederlandsch Praktyk, Tit. "Curator," p. 209.

Petition by a minor for the appointment of a curator ad litem.

(Heading.)

I. That your petitioner's parents, who resided at . . . . . in this Colony, have been dead several years, and that your petitioner, who was born on the . . . . day of . . . . and is now 18 years of age, is a minor and has no guardian.

II. That since the death of his father till towards the end of last year your petitioner was at school at . . . . . during which time his eldest brother managed his farm hereinafter named, but since your petitioner left school he entered upon the occupation and management of the farm.

III. That your petitioner inherited from his parents the farm called . . . . . situate in the division of . . . . . adjoining the farm . . . . . the property of C.D.

IV. That for some time past the said C.D. has wrongfully and unlawfully diverted the water of a certain stream called . . . . . flowing through your petitioner's farm, and to which your petitioner alone is entitled.

V. That your petitioner has in consequence suffered damage, and intends to institute an action against the said C.D. for an interdict to restrain him for the future from diverting the water as aforesaid, and for damages for unlawful diversion.

Wherefore your petitioner prays that your lordships may be pleased to appoint Mr. . . . . of . . . . . as *curator ad litem*, to assist him in instituting the said action.

And your petitioner, &c.

(*Verifying Affidavit.*)

Petition by a friend of the minor for a curator ad litem.

(Heading.)

I. That A.B. is a daughter of the late C.D. and E.F. and is now of the age of 7 years and has no guardian.

II. That the said C.D. and E.F. died within a couple of days of each other in Capetown of small-pox, in the year 1882, and the said A.B. was taken care of by her maternal aunt, Mrs. G.H.

III. That some time prior to their death the said C.D. and E.F. had pledged some of their assets for debt, and ultimately renounced their right to these goods in satisfaction of the debt; and that a few days before their death, upon being told that there was no hope of their recovery, they handed their daughter, the said A.B., the hereinafter-mentioned articles as her own property, while the bedroom furniture and a few other articles were burnt by order of the medical attendant.

IV. The said C.D. and E.F. died intestate and no executor dative has been appointed to their estate.

V. That the articles so given by her parents to the said A.B. as aforesaid consist of two gold watches with trinkets, some diamond rings,

and other jewellery, with a dozen silver spoons and a dozen silver forks, all of the value of about £80, which were taken possession of by the said Mrs. G.H. in trust for the said A.B.

VI. That without any lawful cause or excuse, the said G.H. has turned the said A.B. out of her house into the streets and refused her further shelter or to give up the articles before mentioned, or to pay their value.

VII. That your petitioner, taking an interest in the said A.B. owing to the friendship which existed between him and her parents, at whose house he was a frequent visitor, and feeling sorry for her as she has no relative willing to take care of and to protect her, has resolved to petition your lordships for the appointment of a *curator ad litem* to the said A.B. to sue the said Mrs. G.H. to restore the said articles, or to pay their value, the said sum of £80.

Wherefore your petitioner humbly prays that your lordships may be pleased to appoint him *curator ad litem* to the said A.B., or to appoint some other person as to your lordships may seem fit, for the purpose of suing the said Mrs. G.H. to restore to the said A.B. the said articles; or to pay their value; or, to grant such other relief in the premises as to your lordships may seem fitting.

And your petitioner, &c.

Petition by a stranger (or any plaintiff) who wants to sue a minor who has no guardian, for the appointment of a curator ad litem.

1. That by the will of his grandfather C.B. a bequest of the farm V . . . . is conditionally made.

2. That by the will of your petitioner's father J.B. the same farm is also conditionally bequeathed.

3. That these conditions affect only your petitioner, and his younger brother J.A.B.

4. That your petitioner intends to institute an action against his said brother, under both wills, to have their respective rights determined.

5. That petitioner's said brother is a minor of about . . . . years of age, and although his mother is nominated guardian to the minors, by his father's will, she has taken out no letters of confirmation, and moreover is now married to one H. W.

Wherefore your petitioner prays that your lordships may be pleased to appoint a *curator ad litem* to your petitioner's said brother J. A. B. for the purpose of defending any action to be brought by him against his said brother in regard to the said bequest in the said wills.

And your petitioner, &c.

(*Affidavit of Verification.*)

CHAPTER III.

ON SUMMONSES IN GENERAL AND THE SERVICE THEREOF.

A SUMMONS, also sometimes called a citation, may be defined

"as a judicial command, or admonition, calling upon the defendant to answer the complaint of the plaintiff, or to comply with what he demands, and to hear the judgment according to law."

All summonses must be issued in the King's name[1] and they must be tested in the name of the Chief Justice, if issued out of the Supreme Court, where he presides: if issued in the other High Courts, then in the name of the chief presiding judge of those Courts.

The "testing" is the witnessing part of a summons, and expresses the date and place of its issue.

Any person who feels himself aggrieved may take out a summons against any other person without a Judge's order; but a Governor cannot be summoned, nor any of the Judges, without the leave of the Supreme Court being first obtained.[2]

A summons is the commencement and foundation of an action upon which the whole case is built, and if that is defective the rest of the proceedings are void. The Court has always, however, the power to allow an amendment of the summons, if the addition or alteration is not material to the case, and where the defendant can in no way be prejudiced by it.[3] But it is sometimes less expensive to withdraw a summons and issue another than to apply for the amendment of one which is sure to be opposed.

[1] But see Chapter on "*Edictal Process.*"

[2] Rule of Court 9 of Tennant's Collection.

[3] *Le Roux* vs. *Prins*, 2 J., 405.

But though the summons may be faulty, if the defendant appears to answer the action and does not object to the defective summons, he is held to waive any right of objection he would otherwise have had;[1] but if he objects, and the Court does not allow the amendment, then the summons must be set aside as void *ab initio*, and the plaintiff has to pay the costs.

Before issuing a summons it should first be ascertained whether both the party suing and the party to be sued have the *legitima persona standi in judicio.*[2]

A summons in an illiquid case may be issued and made returnable in or out of term;[3] but a summons in a liquid case, though it may be issued on any day in or out of term, can be made returnable only on a day set apart for provisional cases;[4] and although all process of the Court returnable on a Sunday, or upon a holiday, shall be returned on the following day,[5] this cannot generally apply to summonses in provisional cases, except where the usual provisional day falls on a Sunday.

A summons requires the name and address (and if the profession, trade, or occupation can be given, so much the better) of the plaintiff and the defendant to be stated clearly and distinctly, so as to admit of no doubt as to who are the parties suing and sued. It should also set forth briefly but clearly the nature and cause of the action or complaint, and the relief sought by the plaintiff, so as to leave the defendant no room for doubt as to what is meant, or demanded, or required of him; and if the right to sue is derived through a cession of action, that cession should be stated in the summons.

The summons should contain also the date of its issuing, the day when the defendant has to appear, or in illiquid cases so many days after service thereof, and the Court in which he is to appear.

The District Registrars under Rule of Court 327 (*i.e.*, for this purpose the Magistrates) have no authority to issue

[1] Mer., 4, 11, § 6, and Fron., III., i., § 5, and notes.
[2] See Chapter "*Actions.*"
[3] Consult Rules 9, 20, 329, 330.
[4] Consult Rules 12 and 272.
[5] Rule 10.

summonses for *provisional* sentence out of the respective Resident Magistrates' Courts returnable in the Supreme or E. D. Court; but they may issue summonses for *illiquid* cases only returnable in those higher Courts.[1]

The dates on or about which, and the places at which the alleged grievances took place should, as near as possible, also be given in the summons. Formerly costs were not claimed in a summons, as the Court could always grant or withhold costs, but in the case of *McLeod* vs. *Meyers*,[2] the Supreme Court decided that costs should be claimed in future, especially where, as in this case, the defendant was (or is likely to be) in default.

Several causes of action by the same plaintiff against the same defendant, so long as they are not repugnant, may be cumulated in one summons: for instance, a liquid as well as an illiquid claim may be in one summons,[3] and so also may divers persons, *for the same cause of action*, be included in one summons; but there may not be included in one summons divers actions against divers debtors from divers causes.

When two or more summonses are issued by the same plaintiff or plaintiffs against the same defendant or defendants at the same time, or shortly after each other, and when one summons would have equally answered the purpose, the costs of one summons only are allowed.[4]

If two or more defendants are summoned in one summons in an action for debt, the summons should state (though perhaps now this strict technicality will no longer be insisted upon by the Court) that *if one of them pays, the other or others will be absolved;* as, for instance, "Command A, B, C, and D, that jointly and severally, and without delay, *the one paying, the other or others to be absolved*, they render and pay to E the sum of £— &c." This absolution of one, if the other pays, is only as far as the plaintiff is concerned, but among themselves the defendants may still be liable to each other.[5]

If from the nature of the debt sued for there is no stipulation from when interest is to be paid, or at what

[1] *Woodhead, Plant and Co.* vs. *Peterson and Co.*, 6 C. T., 497.
[2] 5 C. T. 167.
[3] Mer., 4, 24, 6 & 7; and 37, 2, § 16.
[4] See Chapter "*Costs.*"
[5] Jud. Prak., II., 6, § 4.

rate, the plaintiff can claim interest in the summons only *a tempore moræ*,[1] which in our practice has been taken to be from the date of the issuing of the summons. The interest should be specially claimed in the summons, and by our law only six per cent. can be claimed where there is no undertaking to pay more.[2] Hence no compound interest can be charged in the absence of a special agreement to that effect;[3] nor may the interest exceed the principal sum.[4] In summonses in provisional cases, interest is claimed from the date mentioned in the document sued on, and if no date is mentioned from which interest is to be calculated, then the interest is to be claimed in the summons, and paid from the date the debt becomes due.[5]

If a person sues on a Mortgage Bond, or Deed of Hypothecation, and he wishes the property mortgaged to be sold without subsequent legal steps, he should call upon the defendant in the summons to show cause why the property shall not be declared executable; for instance, after the defendant has been called upon to plead, &c., the plaintiff should add, "and at the same time to shew cause, if any, why the property specially mortgaged by the said Bond shall not be declared executable for the sum above demanded."[6]

But the Supreme Court has refused to declare the landed property executable where defendant was sued for interest only.[7] Of course, if it should afterwards appear from the Sheriff's return that there are not sufficient movables to satisfy the judgment, proceedings must be taken in terms of the 36th Rule of Court.

If there is an error in the summons as to the plaintiff's name, the objection to it should be taken at the commencement of the suit, and not after issue joined.[8] And where the error is as to the defendant's name, for instance, "J. Thorby for Jabez Thorley," the summons is void.[9]

[1] Jud. Prak., II., 6, § 7.
[2] *Dyason* vs. *Ruthven*, 3 S., 282.
[3] *Heineman* vs. *Barnes*, 6 C. T., 106.
[4] V. D. K., 549; and *Heydenrych* vs. *Du Preez*, 7 C. T., 1.
[5] See Chapters "*Provisional Sentence*" and "*Summons in Provisional Cases*"; also *Thibart* vs. *Thibart*, 3 M., 472.
[6] Jud. Prak., II., 6, § 5.
[7] *Mutual L. A. Society* vs. *Niekerk*, 3 J., 318; see also *Colonial Government* vs. *Garike*, decided in 1902, not reported.
[8] *Stenhouse* vs. *Kirsten*, 3 M., 494.
[9] *Thorley* vs. *de Lima*, 1 M., 91.

An insufficient description of plaintiff or defendant in the summons is fatal to the summons. The rule is, that their full names and addresses should be given.[1] And if insufficiently given, the Court may, by way of punishment, disallow the attorney or agent his costs on the summons, and order an amendment of the summons if it has been duly served on the defendant intended.[2] As to what amounts to a sufficient description must depend upon the circumstances of each case. A few examples only must suffice, for instance :—

1st. Where the defendant was described as "Jan C. Heydenrych, of Burghers's Post, in the Cape District," it was objected that "C" was not a name—but the Court held the defendant was sufficiently described to warrant judgment and execution being issued against him as "Jan C. Heydenrych."[3]

2ndly. On the contrary, when the defendant was described only as "J. Hoole" of Grahamstown, &c., in the District of Albany, it was held not a sufficient description of the defendant,[4] the Court apparently holding that the first name, at least, of the defendant should be given in full and not by an initial letter.

3rdly. So also where the plaintiffs were described as "William and Henry Farmer," the Court held that they were not sufficiently described and set forth by these words: they should have sued as "William Farmer and Henry Farmer," &c.[5]

4thly. Again, where the defendant had after his name in the summons and in the writ the words "H. O. son," whereas he was "J. P. son," the Court held that the description "H. O. son," or "J. P. son," was surplusage, and that a mistake in regard thereto was of no consequence if the identity of the defendant was otherwise sufficiently established by reference in the summons to his dwelling-place, and the summons and notices, &c., were duly served on "J. P. son," the person truly intended in the summons.[6]

Summonses have frequently been issued and judgments

[1] *Rawstorne* vs. *Theron*, 1 R., 144.
[2] *De Stadler* vs. *Morris*, 9 J., 480.
[3] *Rens* vs. *Heydenrych*, 1 M., 124.
[4] *Norden* vs. *Hoole*, 1 M., 125, and *Malcher & Malcomess* vs. *van Rooyen*, 2 E. D. C., 155.
[5] *Farmer* vs. *Owen*, 1 M., 124.
[6] *Buck* vs. *Eksteen*, 1 M., 475.

obtained thereon where the middle name of the defendant was given by the initial letter only, but I know of no case in which judgment has been given where the first name of the defendant was described simply by the initial letter. In case a person has been baptised by an initial letter (as is common in America), and he is summoned by that title, the Court, upon being satisfied that this is so, will give judgment against him. The Court has the power to amend a summons because of insufficient description.[1]

If a partnership firm sues, or is to be sued, the names of all the public partners are to be inserted in the summons, whether they are in or out of the Colony; and the style or firm under which they trade or carry on business is also to be stated. But it is not necessary to insert the names of the sleeping partners. It is sufficient to bring the action in the name of the partners who hold themselves out as such to the public.[2] But where there is no partnership though there might be a joint employment (as by several co-owners of a farm) each is liable, not *in solidum* but *pro rata*.[3]

The summons should always be directed against the defendant, and not against his agent, though he may have appointed the latter, by general power of attorney, to manage and transact all his affairs for him, and though he may be absent from the Colony; but the service of the summons on the agent is good service.[4]

A person who sues or is to be summoned in his *official* or *representative* capacity, should be clearly described in the capacity or qualification in which he acts; as, for instance, "A—— of —— *in his capacity* as executor testamentary of the estate of the late B"; or "C—— of —— in his capacity as the Colonial Secretary of this Colony"; or "D—— of —— in his capacity as Master of the Supreme Court and as such representing the Guardians' Fund"; and he must prove the capacity in which he sues, or the defendant's capacity, unless the latter admits it. If summoned in his private capacity when he should have been sued in his official or representative

[1] See the case of *De Stadler* vs. *Morris*, quoted above; and *Swanepoel* vs. *Birk*, 3 C. T., 122.

[2] *Lolly* vs. *Gilbert*, 1 M., 434.

[3] *Auret's Trustees* vs. *Pienaar*, 3 J., 40.

[4] *Dickenson* vs. *Ley*, *q.q. van der Chys*, 2 M., 185.

capacity, or *vice versâ*, the summons will be void and the plaintiff will have to pay the costs. To give a person's title, or state who he is, does not imply that he is sued *in his capacity*.[1] When the Master of the Supreme Court sues a surety who becomes such for the due administration of an estate, the Supreme Court has decided that the summons should be in the same form as in an *illiquid* case, and not as in a provisional case.[2]

When a surety is summoned either alone or with the principal debtor, it is not legally necessary to offer him *cession of action* in the summons; it is sufficient if the plaintiff, when required, shall make such cession;[3] although, in practice, the cession of action is always tendered in the summons, as it is more regular and saves delay.

But if the defendant neglects to demand and take cession of action before he pays the plaintiff, he has nevertheless a right to proceed in his own name against the principal debtor to recover what he has paid on his account; he is required, however, to produce his receipt or other good proof that he has paid the plaintiff.[4]

A summons expires if the plaintiff does not appear on the day for which the case was allowed by the Court to stand over, and the defendants must be summoned afresh.[5]

When the summons is issued the plaintiff must proceed with the action, if the defendant does not come to a settlement, as otherwise he will have judgment signed against him on the application of the defendant for not proceeding on the summons within the time prescribed by the Rules of Court.[6]

If there are two persons of the same name, and the one not intended is summoned and appears, the summons is void and the plaintiff must pay all the costs, and though he does not appear and judgment is given, it cannot be executed against him.[7]

If a person is summoned before a wrong judge, he is

[1] See Chapter "*Actions*."

[2] *Master* vs. *Werner and others*, 4 C. T., 418; *Master* vs. *Talbot's Sureties*, 6 C. T., 392.

[3] *Horne* vs. *Loedolf*, 1 M., 403.

[4] V. d. Linden, I., 14, § 10.

[5] *Schutte* vs. *Wylde*, 1 M., 403; see also Chapter "*Comparuit*."

[6] See Chapters "*Actions*," "*Defaults*," and "*To have judgment signed against plaintiff*."

[7] Zutphen, Ned. Prak., pp. 131 and 132.

bound to appear either personally or by attorney, otherwise he may be held to be in contempt.[1]

In a summons for civil imprisonment it is necessary to aver the issue of the writ, of the execution on the judgment, and the sheriff's return of *nulla bona*, or the deficiency on the writ.[2]

A summons, though prepared and ready for issue, is not considered *issued* so long as it has not yet been formally issued by the Registrar of the Court and signed by him; and no costs can be claimed from defendant for preparing such summons if before the formal issue by the Registrar the defendant tenders the money.[3]

No alteration in a summons can be made, after its issue, without the sanction of the Registrar, even though the return day has been extended at the request of the defendant.[4]

In a summons by one of the co-proprietors for the division of a farm, or land, held in undivided shares, all the other co-proprietors should be included in it, either as plaintiffs or defendants, so that all may be before the Court.

A summons for the purchase amount of landed property should tender the transfer of that property; and a summons for transfer of the property should tender the purchase money, or compliance with the conditions of sale.[5]

On the withdrawal of a summons, no fresh summons can be issued until the defendant's costs of the former summons have been paid;[6] that is if there has been an order for costs, otherwise not.[7]

Formerly the summonses had to be framed with the most exact circumspection, care, and elaboration, but now all that is required for the three higher Courts is, that the summons should "*state in concise terms generally the plaintiff's cause of action.*"[8] But the samples of forms given in the Appendix are sometimes literally followed by some practitioners, without

[1] De Academie, 38th Chap., p. 503; and Loenius, 102.

[2] *Ingram Brothers* vs. *Theunissen*, 3 M., 148; and see Chapter "*Civil Imprisonment.*"

[3] *Estate Haupt* vs. *Robertson and Bain*, 2 B., 1.

[4] *Hansen & Schrader* vs. *Pauling*, 4 J., 92.

[5] *Fouchee* vs. *Van Ellewee*, 1 M., 18.

[6] *Simson & Co.* vs. *Fleck*, 2 M., 255.

[7] This case is explained by *Marincowitz* vs. *Mathys*, 12 S. C., 176, and 5 C. T., 299; *Thacker* vs. *Fourie*, 7 C. T., 132, and 14 S. C., 123.

[8] Appendix to Rule 326.

their giving any addition or stating the cause of action more fully, forgetting that the rule requires the defendant "*to answer the plaintiff's action*"; and the want of a more complete statement becomes more apparent only when, in case of the default of the defendant, the plaintiff sets the case down for judgment on the summons, and the Court has no other information before it than the laconic words in the summons "money lent," "arrear of rent," &c.; and the superior Courts have commented on this insufficient information in cases where no pleadings are filed or no appearance is made for the defendant.[1]

The object of the new rule was to do away with the roundabout technicalities and formalities of the old rule, which required that the "declaration shall not vary from the summons," and the slightest variance, however unimportant, has often successfully been taken advantage of by the defendant.[2]

The forms given under the new rule are an imitation of the forms of the English High Courts of Judicature, which are very brief; but then in England the summons must be accompanied by a specified account, or a statement giving fully the particulars of the plaintiff's claim.[3] Not so with us; but our rule will answer the same purpose, if taken as a whole and carried out in full.

It is true that the object of a summons is to bring the defendant into Court at as little expense as possible, and that if he intends to defend the action he will get all the information from the plaintiff's declaration to be served on him afterwards; but unless he has full knowledge of the plaintiff's claim, he is often unable to take advice on the summons as to whether he can defend or not. An attempt to get the information by applying for it he fears may entrap him into an admission of his liability; to employ an attorney to obtain the information adds to the expense. Many such instances have occurred, and the result has been that cases in which there was no defence have been defended, only to

[1] One case in the Supreme Court in 1882, the name of which I cannot trace; for the other see 3 E. D. C., 159.

[2] See also *Le Roex* vs. *Prins*, 2 J., 405.

[3] Order 2, Rule I. of the Judicature Act of 1875, 38 & 39 Vict. c. 77.

be abandoned on getting the plaintiff's declaration; or, where there were good defences, have been allowed to go by default.

Surely the summons may be a little more certain, clear, and perspicuous; it will not add to the expense, while the Court will be in possession of all the information from a perusal of it. Besides, it will then really be complying with the Rule (326) which requires the defendant "*to answer the plaintiff's action*," which he can only do after a statement of the nature of it; and with the Appendix to that Rule, which requires the summons to state "*in concise terms . . . generally the plaintiff's cause of action.*"

The forms suggested at the foot of this Chapter state all the essential requisites of a summons, without being too verbose on the one hand or too laconic on the other; tell the defendant what is required of him; give the Court all the information necessary; and, above all, do not add to the labour or expense of the action. If used in the three higher Courts (*i.e.*, Supreme, Eastern Districts, and Griqualand West Courts) some of the forms may perhaps be a little abbreviated, if thought necessary, in cases where declarations must be filed, whether the defendant enters appearance or not; but they should not be curtailed where no declarations need be filed, or when used in the Circuit Courts, for the 326th Rule does not apply to the latter Courts. When using these forms in the Circuit Courts there need only be added in conclusion a prayer, as in a plaintiff's declaration—as for instance, "*which said sum the defendant refuses to pay, and the said plaintiff prays that he may be adjudged to pay the same.*"

In the three higher Courts mentioned the summons can no longer, in illiquid cases, contain the *hour* or exact date of the defendant's appearance (except in such illiquid cases, mentioned below and in other parts of this book, as require no pleadings and can be tried on the return day of the summons). He is to cause an appearance to be entered for him so many days "*after the service of the summons,*"[1] and he has, in addition thereto, *four days of grace* before he actually need enter appearance.[2] But in all liquid cases in all Courts,

[1] Rule 326. [2] Rule 329.

and also in all Circuit Court cases, the hour and exact date when the defendant has to appear must be stated, and in those instances he has no days of grace allowed to him.[1]

All civil process of the Circuit Courts may be issued by the respective Registrars of the three higher Courts within the jurisdiction of such Courts respectively,[2] as well as by the Registrars of Circuit, or Magistrates' clerks within their respective jurisdictions;[3] but Magistrates' clerks have no power to sign writs of arrest.[4]

In the Circuit Court, in illiquid cases, the summons stands in the place of a declaration of the cause of action between the parties "*unless the Court shall otherwise order.*"[5] But as the Court can only make the order at, or immediately before, the trial, there will in most cases be no time for counsel then to draft the declaration; and as the defendant has to plead three days before the return date of the summons,[6] when perhaps the Judge is still busy at another circuit town, the filing of a declaration may necessitate the plea and other subsequent pleadings being amended, which would cause considerable delay and prevent the case being tried that circuit, thus making this part of the Rule practically useless. A practice consequently gradually arose of having the summons drafted by counsel and containing all the formalities and legal requirements of a declaration of the higher Courts; but as this practice was not sanctioned by any Rule of Court, the want of such a Rule was often felt when, either through excess of caution a declaration was drafted by counsel to stand for a Circuit Court summons, and after the trial the taxing officer regretted he could not go behind the 170th Rule and tax the extra expenses of such a summons; or when again (and this was of the most frequent occurrence) for fear of an objection to the extra expense a simple summons only was issued, and disappointment was felt at the trial both by Bench and Bar, inasmuch as the legal points involved in the case were not raised in the summons.

To some extent these inconveniences are now overcome

[1] Rules 12, 170 and 329.
[2] Rule 379.
[3] Rules 162 and 163.
[4] Rule 164, and see Chapter "*Arrests.*"
[5] Rule 170.
[6] Rule 278.

by the 294th Rule, which allows summonses in all Courts, *also in the Circuit Courts*, in *special cases*, to be drawn by one counsel, and the costs thereof are to be allowed between party and party. The summons when drawn by counsel for the Circuit Court includes all the requirements of a declaration, thus practically overcoming the difficulty of filing a declaration on circuit, after the defendant has pleaded to the summons, while the rest of the 170th Rule is still in force. Unless, therefore, the case is very great, or of *special* importance, the forms of summonses at the foot of this Chapter will answer all the requirements of a Circuit Court summons and declaration.

All that a person will now have to observe, in getting a summons drawn by counsel in the three higher Courts, or a summons to stand for a declaration in a Circuit Court, is to exercise a cautious and wise discretion as to whether or not the case can be said to be a *special* one; or, in other words, whether it is of sufficient importance and magnitude to justify the extra expense; while at the same time, in addition thereto, in the Circuit Court practice, he should bear in mind the disappointments, mentioned above, if a summons does not raise the legal points of a case. No hard and fast rule can be laid down in such a matter; general principles only can be stated. Much must depend upon common sense where it is a matter of discretion; but the discretion should be so exercised as to admit of justification under all the circumstances of the case. For a client will not be likely to acquiesce if, on the one hand, he is put to unnecessary extra expense or, on the other, if, for want of a little extra expense, his case is wrecked.

I have gone somewhat fully into this part of the Circuit Court practice, not only on account of its importance, but also in answer to continual enquiries for information.

In the following instances, whether opposed or not, no pleadings of any kind need be filed, and the case may be heard and judgment given on the summons only on the return day thereof.

(*a*) In provisional cases the denial of the signature, or of the debt, may be proved instanter.[1]

[1] See Chapter "*Provisional Sentence.*"

(*b*) To have a person declared of unsound mind.

(*c*) To have a person declared of sound mind again.[1]

(*d*) To compel an executor to file an account.[2]

(*e*) In an action for "*Perpetual Silence.*"[3]

(*f*) On a summons for "*Review.*"[4]

(*g*) On a summons for "*Civil Imprisonment.*"[5]

If the action is not opposed, then

(*h*) When the defendant is in default of appearance, and the plaintiff's claim is for a debt or a liquidated demand only.[6]

In a Circuit Court

(*i*) The plaintiff's declaration only is dispensed with, but not the rest of the pleadings.

A summons when issued operates in several ways:

(1) It perpetuates jurisdiction.

(2) It interrupts prescription.

(3) It induces *litis pendentis.*

(4) It transmits the action, or process, to the heirs of the deceased.[7]

All this is to be understood, however, of a good summons only, and not of a defective one, which is void *ab initio.*[8]

As the due SERVICE of a summons is so closely connected with, and may almost be said to be part and parcel of, a good summons, for the attorney is often called upon for instructions as to service, I shall treat of that subject here, instead of in a separate Chapter.

It has been held that the service of a summons is a sufficient demand for payment,[9] but this refers only to the question of costs, in case the defendant within a reasonable time offers to comply with the summons.

When a person is summoned, a true copy of the original summons is to be served upon him, either by delivering such

[1] See Chapter "*De Lunatico Inquirendo.*"

[2] § 33 of Ord. 104, and Act 14 of 1864, § 1.

[3] See that Chapter.

[4] See that Chapter.

[5] See that Chapter.

[6] Rule 329.

[7] Mer., 4, 24, 2; and Fron., 3, 2, § 2.

[8] For the general principles laid down in this Chapter see also, in addition to the authorities quoted above, Mr. Justice James Buchanan's Translation of Voet, Vol. I., Bk. II., Tit. 13.

[9] *Redelinghuys* vs. *Theunissen*, 2 M., 258.

copy to him personally or by leaving it at his usual or last known dwelling-house or place of business.[1] A service of a summons on a neighbour of the person summoned, though good by the law of Holland, is bad service with us.[2] If the summons is not served personally on the defendant, but left for him at his dwelling-house or place of business, it should be entrusted to one on the premises who is of years of discretion; and if no such a one is to be found, then it should be served by affixing or fastening it to the front door; and the Sheriff, in his return, should state that in the absence of the defendant and his household he has served the summons *at the usual and last known place of residence of the defendant*, and he should also add where this last known place of residence or business is situated.[3]

The phrase "*last known place of residence*" has received no special judicial interpretation that I am aware of either in England or here, but from remarks made by the Court from time to time as to the "*sufficiency of a service*," we may gather certain principles which may serve us as a guide how to instruct as to a service, and how to make a return. The main principle to be always borne in mind is "*that the summons must come to the knowledge of the defendant.*" If, then, there are circumstances which go to shew that the summons will not reach the defendant, it cannot be served at his "last known place of residence." If it is known that he has abandoned, or left for good, his residence, it cannot be served there. If it is known that he has changed his residence, but it is not known whither, it cannot be served at the last place. If he has been absent from his residence without a good reason and for an unreasonable period, according to the nature of his vocation or of his usual habits, and has left no one in charge, we must infer an abandonment of residence, and summonses cannot be served at the last place. It is not the mere absence of the defendant that should always be considered, but whether he has left some-

[1] Act 2 of 1857, § 2, and Rule of Court 217.

[2] *Meyer* vs. *Marais*; *Snyders* vs. *De Villiers*; *Leckie Brothers* vs. *Farmer*, 1 M., 130, 132 and 133; and *Van Druten* vs. *Williams*, B. for 1878, p. 3.

[3] *Truter and Meeser* vs. *Mechau*; *Townley* vs. *Cameron*, and *Wood* vs. *Broadman*, 1 M., 131, 134 and 137.

one in charge of the residence. If the latter, then the absence is presumed to be only temporary, unless, according to the nature of the business for which he left, he is absent, without good cause, for an unreasonable period.

If the defendant is only temporarily absent, or there is a reasonable presumption of only temporary absence, or there is no circumstance to shew, or reasonably to infer, an abandonment of residence, or so long as the "intention to return" can be reasonably inferred from all surrounding circumstances, and cannot be disproved, the service at the last known place of residence will be good.[1]

The last known place must be known and the present residence unknown, to justify its service at the former.[2]

In the case of *The Protecteur Assurance Company* vs. *Erwin*,[3] in which the service of the summons had been made at Ceres, the last known place of residence of the defendant, but where he had not been for seven years, the Court held the service bad and said "*that the object of the provisions of the law was to secure the process coming to the knowledge of the defendant.*

Seven years' absence on the part of a defendant from his last known place of residence, his whereabouts meanwhile not being known, is manifestly, under all circumstances, an unreasonable period.

In the cases of *Townley* vs. *Cameron*,[4] and *Wood* vs. *Broadman*,[5] the Supreme Court decided—

"that where there were no circumstances mentioned in the return of service, and no evidence was produced by the defendant, or others, to make it appear to the Court probable that the copy summons had reached the defendant, the service at the last known place of residence, in the absence of the defendant and of all the inmates, will be good: but on the other hand, where from the circumstances stated in the return, or from evidence, it appears that the summons had not reached the defendant, the service will be insufficient."

Service on a person's landlady at his last known place of residence (a boarding-house), and where the landlady was

[1] See also *Wolff* vs. *Wolff*, 3 C. T., 277.
[2] *Truter and Meser* vs. *Mechau*, 1 M., 131.
[3] 4 J., 91.
[4] 1 M., 134.
[5] Ibid, 137.

not aware whether the defendant would return or not, was held good service.[1]

If the party who has to serve the summons hears people talking in the house but who refuse to open the door or admit him, so as to allow the summons to be served, he is justified in affixing the summons to the door or putting it under the door, stating in his return why he did so.

Where the return stated that the defendant and all his family were absent from the house for some weeks, and that service had been made by introducing a copy of the summons through the window, it was held a good service.[2]

If the party upon whom the summons is to be served will not accept it upon its being tendered to him, the person serving it can throw it towards him (but no assault should be committed) or drop it upon the ground in his presence, and this would be a good service.

If it is dangerous to serve a summons on the defendant, as, for instance, if at the place where he lives the enemy lurks; or it is occupied by the enemy, as in the time of the war between the Spaniards and the Dutch;[3] or if there is an infectious or epidemical disease raging, or other threatening danger; in all such cases the defendant must be summoned by edict.[4] So also must the defendant be sued by edict if he has no fixed domicile, or moves about from place to place so that one cannot find out his residence to serve the summons on him, no matter for what cause, or with what motive he may do so. If it can be ascertained, however, where he is most frequently, the summons should be served at that place.

If the defendant has several residences, then the summons is to be served at the place where he was living at the time of the issuing of the summons, and if it is not known in which house he was living at the time, then at the house where he is most frequently, or where he has his family and the most goods.[5]

When serving a summons on a defendant, or other person

[1] *Van Staveren* vs. *Bain*, 2 C. T., 207.
[2] *Shawe* vs. *Murray*, 1 S., 64.
[3] Van Alphen, I., i., 2.
[4] Fron., III., I., § 2, Note 20.
[5] Zutphen Ned. Prak., p. 130, and Mer., 2, 5, and also 4, 24, 15, §§ 5 and 6.

for him, he should be informed of *the nature and exigency thereof.*[1]

A sufficient number of days should intervene between the date of the service of the summons and the day on which the defendant has to appear. This interval varies according to the distance the defendant resides from the Court to which he is called upon to answer the action. At present the number of days that must intervene, exclusive of the date of service of summons and of the defendant's appearance in the Supreme Court, is regulated by the 328th and 377th Rules of Court.

The service of the summons in the E. D. Court is regulated by the 249th Rule of Court; in the Griqualand West Court by the 328th and 343rd Rules; and for the Circuit Courts by Rules 168 and 279.

In the Circuit Court the modes of serving and executing all summonses and other process of the Court are the same as in the Supreme Court,[2] but the number of days that must elapse between the service of summons and the defendant's appearance is different from that required in the Supreme Court, and is stated in the 279th Rule of Court.

It is to be observed that while a summons issued out of the higher Courts can be served on the defendant either at his place of business or residence, a summons issued out of a Magistrate's Court can be served only at the defendant's residence. A corporation, having no residence in the popular meaning of that word, is to be served at its place of business.[3]

If a married woman, who has the *legitima persona standi in judicio,* is sued, it is necessary that a copy of the summons served on her should be served also on her husband.[4] A married woman is usually summoned in this form: "Command A——, of —— (shopkeeper), *duly assisted as far as need be by her husband,* B——." If they are married without community of property this should also be stated in the summons, as for instance: "Command A——, of ——

[1] Ord. No. 37, § 5.

[2] See 168th Rule.

[3] *Beedle & Co.* vs. *Bowley,* 12 (S. C.), 401; *Scott* vs. *Clarke & Co.,* 13 (S. C.), 15; *African Diamond Mining Company* vs. *Eden Brothers,* 1 A., 379.

[4] See Chapter "*Actions,*" and *Landsberg* vs. *Marchand,* 1 M., 200.

(baker), *married without community of property to B——, and duly assisted by him as far as need be*, that," &c.

If the husband sues the wife for divorce or separation, then of course he does not require a copy of the summons to be served on him, and the above expression, "*duly assisted as far as need be*," is omitted from the summons; so also is this latter expression left out if the wife sues her husband.

If the wife is plaintiff, the same expression is used.[1]

The expression, "*duly assisted*" &c., is one used in practice and not absolutely necessary to the validity of the summons. It originated from the assumption that the husband joined in the action; but suppose he will not join her, what then is the use of the expression?

If a partner of a business is absent from the Colony and an action is to be instituted against the firm, he must be included in the summons, and the copy summons intended for him must be served at the place of business of the company, and the *induciæ*, *i.e.*, the delaying extension of time, of such a summons will be the same as if he were here. If he has appointed an agent to represent him during his absence, the summons is to be served on that agent.[2]

But where the Court has ordered a personal service, as in an Edictal Process, then such service cannot be made on an agent.[3]

Service of one copy only of a summons for a partnership debt, not at the place of business of the partnership but at the residence of the partners, is bad service,[4] whereas service of the summons at the counting-house of a partnership firm was formerly not service against one of the partners individually[5]; but now, by Rule 217, such a summons may be served at a person's place of business as against him individually. As to nonjoinder of an absent partner in an action for a partnership debt see Chapter "*Actions*."

If a person in a bond, or power of attorney, or in any

[1] See Chapter "*Actions*."

[2] *Maintjes & Co.* vs. *Simpson Brothers & Co.*, 2 M., 216, and *Clarke* vs. *Jims Brothers*, 2 E. D. C., 165.

[3] *Gamble* vs. *Sauer*, 7 J., 323.

[4] *Clarke* vs. *Jims Brothers*, 2 E. D. C., 165; *Vos* vs. *Vos & Co.*, 1 M., 132; and *Haupt* vs. *Sparman & Pistorius*, Ibid, 135.

[5] *Terrington* vs. *Simpson*, 1 M., 135.

other instrument, appoints his *domicilium citandi et executandi*, the summons and all subsequent process are to be served and executed at the place so named.

Where a defendant was described in the summons as residing out of the Colony, and the Sheriff in his return stated that he had served the summons at the request of plaintiff's attorney upon A, the alleged agent of the defendant, it was held insufficient service, as there was no proof of any agency or authority from the defendant to authorise anyone to accept service for him: of course where the agency is proved by the production of the power, or authority, to accept service, the service on the agent will be good service.[1] But service of a summons on an assignee of an assigned estate will be good if by the deed of assignment full power to institute and defend all actions is given to the assignee; and though no special power is given to accept service of summons, this authority is implied.[2] Service of a summons in defendant's absence, at a house where he never resided but in which, while in the occupation of another person, the defendant had occasionally been and taken meals and slept, is not a good service.[3]

If a corporation is sued, the summons should be served on the person stated in the Act of Parliament, and if no person is named, then upon those persons who, according to circumstances, ought to be made defendants though in their representative capacity,[4] and if there are no such persons, then on the one who is the usual agent of communication, as, for instance, the Chairman or Secretary; but the service on a corporation should be at *the place of business of the association*, and not at the private address of the Chairman or Secretary.[5]

A summons cannot be served on a Sunday, nor can any civil process except the case of an arrest,[6] but a Sunday is not excluded in calculating *the induciæ* of a summons,[7] that

[1] *Hofmeyr* vs. *Jurgens*: *Harper* vs. *Southey*, 2 S., 73 and 74; *Stone* vs. *Wright and Abbott*, 4 E. D. C., 178.

[2] *Anderson & Murison* vs. *Dailey & Sutley*, 3 J., 263.

[3] *Ritchie* vs. *Andrews*, 2 E. D. C., 254, and *Simpson & Co.* vs. *Allingham*, 1 M., 131.

[4] See Chapter "*Actions*."

[5] *Semble*, 217th and 329th Rules of Court, and *African D. M. Co.* vs. *Eden Brothers*, 1 A., 379. See also *Beedle & Co.* vs. *Bowley*, and *Scott* vs. *Clarke*, *supra*.

[6] Rule of Court 10; but see also Chapters "*Arrests*" and "*Civil Imprisonment*."

[7] *Blore* vs. *Dryer*, 1 M., 128.

is the clear number of days the defendant is entitled to between the date of the service of the summons and the date of its return.

All the process of the Court, or notices, are to be served in the same manner as summonses, unless the Court otherwise specially directs; but while a summons must, as a matter of course, be served by the Sheriff or his deputy, any other process of the Court may be served by any other person.

Even though a service of summons be insufficient or irregular, if the defendant appears and does not object thereto, he is held to have waived the bad service.[1]

With a summons in an illiquid case no copy of the documents therein referred to need be served, but in a liquid case copies of all documents referred to in the summons must be served at the same time with the summons, and the return of service should state that the documents had been served.[2]

A summons must be served at a proper and reasonable time and place, but cannot be served at all hours. There is no prohibition in law to serve a summons after sunset, but the time should not be so far advanced in the night as when according to the habits and custom of the defendant he has already retired to rest; the hour up to which a summons can be served in the evening after sunset must therefore depend upon the average usual time each defendant is in the habit of retiring to rest for the night.[3] A personal service of a summons on the defendant at his dwelling-house at a quarter-past nine in the evening has been held good.[4] Nor is a summons to be served on a person while he is in church attending divine service, or when attending a funeral, or as a prisoner standing in the dock, undergoing his trial.[5]

But a summons served personally on a defendant confined in gaol is good service.[6]

In case of Edictal Process[7] the summons should be served as directed by the Court.

A summons for compulsory sequestration must be served

[1] *Re Hartogh*, 1 M., 133.

[2] See Chapter "*Provisional Sentence.*"

[3] Huber Hedendaags, Regtsgeleerdheid, II., ii., 1, § 26.

[4] *Sunley's Trustees* vs. *Leibbrant*, 1 M., 138.

[5] Hub. Hed. Regt. Vol. II., Chap. i., § 27.

[6] *Landsberg* vs. *Hendriks*, 1 M., 136.

[7] See that Chapter.

in the same manner as any other summons, provided that if any debtor has been forty days absent from his usual place of residence or business, a copy of the summons be also affixed upon the outer door of the Supreme Court and inserted in the *Government Gazette* of this Colony.[1]

When the defendant is dead, though he died only since the issuing of the summons, no summons can be served, but his executor must be summoned; so also if he becomes insolvent since the issuing, but before the service of the summons, it cannot be served, but his trustee should be summoned. In the two latter cases it is, however, in the discretion of the Court to authorise the service to be made on the executor and on the trustee, but such an application may be more expensive than the issuing of a fresh summons.

If the Sheriff is a defendant in a case, the summons intended for him cannot be served by himself, nor can any subsequent process in that case be executed by him; but the Supreme or Circuit Court may, upon application, appoint a fit person to serve the summons and to execute the process, &c.[2]

In a case where the plaintiff was the deputy Sheriff, and as such served the summons on the defendant, the Court held, that as the Sheriff in his own name made a return that the summons was duly served, there was no good objection appearing against the service.[3]

The Sheriff or his deputy can make a "*return*," or relation, endorsed on or annexed to all civil process entrusted to him, of what he has done by virtue thereof;[4] but any other person serving a document which he may of right serve, cannot make his "return" or certificate, but must make an affidavit of service.

The Sheriff's return of service of summons may be impeached by an affidavit;[5] and if he makes a false return, he is liable in an action for damages.[6]

[1] § 17, Insol. Ord.
[2] Charter of Justice, § 29.
[3] *Brehm* vs. *Watermeyer and another*, 1 M., 527, and *Reynolds* vs. *Jooste*, B. for 1878, p. 1.
[4] Rule 15.
[5] *Terrington* vs. *Simpson*, 1 M. 135, and *Ritchie* vs. *Andrews*, 2 E. D. C., 254.
[6] *Haycroft* vs. *Filmer*, decided in 1863, not reported.

There is no special form for a return of service of any summons, but the return should state what documents were served, when, where, on whom, and how, and also that the defendant, or other person on whom the summons was served, had been informed of the nature and exigency thereof; for instance:—

"On this the —— day of —— I have duly served a copy of the within summons (with copy of the promissory note, or Mortgage Bond, or Bond and cession, therein named), on the defendant . . . . at his dwelling-house at . . . . (*or*: on . . . . one of the servants of the said defendant at the dwelling-house of the defendant at . . . . who said that his master was from home; *or*: on . . . . at . . . . the duly authorised agent of the said defendant who received special authority to accept service as per power hereunto annexed; *or*: on . . . . at . . . . the assignee of the said defendant, who exhibited to me the deed of assignment by the said defendant dated the . . . . day of . . . . ; *or*: on . . . . at . . . . the duly authorised agent of the said defendant, who exhibited to me his general power of attorney dated the . . . . day of . . . .), by delivering it (them) to him personally, and at the same time informing him of the nature and exigency thereof."

Or: "I have on this . . . . day of . . . . repaired to . . . . the usual place of abode of the defendant, and finding the place locked and after several loud knocks at the front door thereof receiving no answer, and after diligent search for the defendant or any of his household, finding no one, I have left a copy of this summons at the said dwelling-house by tacking it to the front door thereof."

FORMS OF SUMMONSES ON VARIOUS SUBJECTS WHICH COME UNDER NO PARTICULAR HEADING, AND NOT OTHERWISE MENTIONED IN OTHER CHAPTERS.

NOTE.—*At the foot of each form add the words* WITH COSTS OF SUIT.

Ejectment at expiration of lease, and for damages for non-delivery.

. . . . claims: 1st, that the defendant may be forthwith ejected from the occupation of the farm . . . ., situate in the district of . . . ., hired by him from the plaintiff on the . . . . day of . . . . for a period of . . . . years, at a rental of £ . . . . per annum, calculated from the . . . . day of . . . ., which said lease has terminated by effluxion of time, yet the said defendant refuses to give possession of said farm though requested so to do. 2nd, The sum of £ . . . . sterling as and for damages sustained by him by reason of the said defendant having neglected and refused to deliver up possession of the said farm at the expiration of the said lease. 3rd, Costs of suit.

Rent.

. . . . claims the sum of £ . . . . sterling of lawful money which he owes to and unjustly detains from him, as and for six months' rent calculated from the . . . . day of . . . . to the . . . . day of . . . ., being for the hire of a certain dwelling-house situate in . . . . street, ..., at the rate of £ . . . . sterling per month ; with costs of suit.

Damages for not getting possession of an erf sold.

. . . . claims the sum of £ . . . . sterling, as and for damages sustained by reason of the defendant having neglected and refused to deliver to him the possession of a certain erf, No. . . . ., ... street, in the town of . . . ., with the buildings situated thereon, which said erf and buildings were sold by the defendant to the plaintiff on or about the . . . . day of . . . ., for the sum of £ . . . ., and possession whereof the said defendant agreed and undertook to give to the said plaintiff upon the . . . . day of . . . ., but of which said erf and of which buildings the said plaintiff has not yet received possession from the said defendant, though all things have happened to entitle him to claim such possession ; with costs of suit.

Damages for false imprisonment.

. . . . claims the sum of £ . . . . sterling as and for compensation in damages sustained by reason that the defendant on the . . . . day of . . . . swore to an affidavit falsely and maliciously, and without reasonable and probable cause, charging him with having broken into the store of . . . ., and there stolen certain articles specified in the said affidavit, upon which affidavit a warrant of apprehension was on the . . . . day of . . . . obtained and he was apprehended and lodged in the gaol of . . . ., and there detained for four days, when he was discharged ; with costs of suit.

Damages caused by fire.

. . . . claims the sum of £ . . . . sterling as and for damages sustained by reason that the defendant on the . . . . day of . . . . in setting fire to a certain part of his lands on his farm . . . . negligently, carelessly and for want of due and proper precaution allowed the fire to spread and to come on to the plaintiff's farm . . . . and there destroyed the grass and bush in the vlei ; also the poplar bush adjoining thereto, and a portion of the fruit trees in the orchard.

Damages through neglect to extinguish fires.

. . . . claims the sum of £ . . . . sterling as and for damages sustained by reason that the defendant, in setting fire to his weeds and rubbish etc. on his land, on the . . . . day of . . . ., without any warning or notice to the plaintiff, did so negligently and carelessly, and without precaution, and failed in proper time to extinguish or to stop the progress of the fire, by

reason of which the fire extended and came on to the plaintiff's land, and into his forests, and destroyed large plantations, fields, vineyards, orchards and forestry: and thereby also caused the waters to dry up in the ravines, and fountains, and springs of the plaintiff, to the total destruction, in consequence of drought, of his remaining crops and plantations, etc.

Damages against the Sheriff for wrongful seizure.

. . . . claims the sum of £ . . . . sterling as and for compensation for damages sustained by reason that the defendant by . . . . his deputy at . . . . did on the . . . . day of . . . . under colour of a writ of execution dated the . . . . day of . . . . issued in a suit where one . . . . was plaintiff, and . . . . was defendant, wrongfully and unlawfully seize and lay under attachment certain 50 head of cattle, 400 sheep, 2 wagons, the property of the said plaintiff, and though the defendant had proof that the property so seized belonged to the plaintiff, yet he advertised them for sale and retained them in his possession for a period of 21 days before he returned them.

To give up a farm in unlawful occupation and for damages.

. . . . claims that he may be declared the lawful owner and entitled to the possession of the farm . . . . situate in the division of . . . . and that the said defendant may be declared and adjudged to have no lawful right or title to the farm, and that he may forthwith be ejected therefrom, and the said plaintiff put in possession thereof; also that the said defendant may be condemned to account for all rents and profits made or received by him by reason of his unlawful occupation of the said farm; or otherwise to pay to the said plaintiff the sum of £ . . . . sterling, as and for compensation in damages in lieu and instead of such rents and profits.

On a Doctor's account.

. . . . claims payment of the sum of £ . . . . sterling of lawful money which he owes to and unjustly detains from him, being the amount due by the said defendant to the said plaintiff upon an account duly rendered of fees and charges for medical attendance by him the said plaintiff upon him the said defendant at his the said defendant's special instance and request between the . . . . day of . . . . and the . . . . day of . . . .

For the hire of certain sheep.

. . . . claims the sum of £ . . . . sterling, being the amount of one year's hire of certain merino sheep ewes, which the said defendant had on lease from one . . . . at the rate of 1*s.* 9*d.* per head per annum, the said lease to expire upon the . . . . day of . . . ., which amount the said defendant on or about the . . . . day of . . . . at . . . . promised and undertook to pay to the said plaintiff upon consideration that the said plaintiff should cede and transfer to him the said lease for the period

which the same then still had to run, and should deliver to him the said ewes to be retained by him for the said period, the plaintiff having duly delivered the said ewes, and otherwise completed his part of the said agreement.

To have a will declared void, on the ground of insanity.

. . . . claims that a certain paper purporting to be the last will and testament of the late . . . . bearing date the . . . . day of . . . ., and by which the said defendants are nominated the executors testamentary, may be declared null and void on the ground (*here state the grounds on which you want the will declared void, for instance*) that at the time of its alleged execution the deceased was mentally incapable of making any testamentary disposition of any kind.

To have a codicil set aside as being contrary to the disposition of a will which could not be altered.

. . . . claims that a certain codicil, bearing date the . . . . day of . . . . made and signed by the said late . . . ., of whose estate the said defendant is the executor testamentary, shall not be set aside and declared null and void on the ground that the said deceased having on the . . . . day of . . . . executed a will with her former husband . . . . in which said will she was made joint heir with the children of the said marriage, received also a certain legacy thereunder and retained the usufruct of the estate during her lifetime; and having adiated under the said will, and also accepted benefits thereunder, she was debarred from altering the said will in the manner attempted by her in the said codicil.

To have part of a will declared void, and also a transfer passed under it.

. . . . plaintiff claims that so much of the will of the late C.D., bearing date the . . . . day of . . . . and which purports to bequeath the farm "Verlatenbosch," in the district of . . . . to E.F. may be declared invalid, as being contrary to the dispositions of the mutual will by the said C.D. and the late G.H., bearing date the . . . . day of . . . . by which the said farm was bequeathed to the plaintiff on certain conditions which he has fulfilled, and which said mutual will has never been lawfully revoked, and could not be revoked by the said C.D. and is still in full force—also that the deed of transfer of the said farm by the said defendant to I.J., passed on the . . . . day of . . . . by virtue of the said will of the said C.D., may be declared null and void, and that it may be cancelled in the office of the Registrar of Deeds, on the ground that the said C.D. had no right to dispose of the said farm.

To have a certain document declared the last will and testament.

. . . . claims that a certain document, or instrument, bearing date the . . . . day of . . . . alleged to have been signed by the late E.F., may

be declared to be the last will and testament of the said E.F. on the ground that it was written in his own handwriting, and signed with his usual signature, and disposes of his estate among his children, and that such an instrument, though not witnessed, is a privileged will, and as such is good in law.

To call upon a minor to adiate under his father's will, and to pay a certain sum of money, or to repudiate so that plaintiff may get other benefits.

Command A.B. of . . . . duly assisted by his Curator ad litem C.D. of etc. . . . . to answer his brother E.F. of . . . .

Plaintiff claims 1st. That the said A.B. shall forthwith decide whether to adiate or repudiate the bequest to him of the farm V . . . . mentioned in the will of their deceased father G.H. ; and if he adiates then to pay to him, the plaintiff, the sum of £ . . . . sterling as provided by the said will, and in that case, that the said defendant A.B. shall pay the plaintiff interest thereon, at the rate of six per cent. from the date the bequest became payable ;

2nd, To shew cause also why, in case he should not adiate, the said farm shall not be declared to belong to the said plaintiff, under his father's will, and under the will of his grandparents I.J. and K.L., and also to account for the usufruct of the said farm from the day the bequest vested.

Against an executor to file account of his administration and to forfeit fees for undue delay.

. . . . the plaintiff, as an heir and having an interest in the said estate, claims that the defendant, in his said capacity, may be ordered forthwith to frame and lodge with the Master of the Supreme Court at Capetown, and at the office of the Resident Magistrate of . . . . a full and true account, supported by proper vouchers, of the whole administration and distribution of the said estate, also to shew cause why by reason of his having no lawful and sufficient excuse for his failure to lodge such account within the time prescribed by law, he shall not be declared to have forfeited all claim to any fees which he would otherwise have been entitled to in respect of the administration of the said estate.

By an heir against an executor to amend his account of liquidation and distribution.

. . . . claims that the account framed by the said defendant, in his said capacity, of his administration and distribution of the said estate, and filed with the Master of the Supreme Court on the . . . . day of . . . . shall be amended by omitting on the debit side the items £ . . . ., £ . . . ., and £ . . . . on the ground that as those claims had become prescribed before the death of the testator, the defendant should not have paid them, or brought them up in the account ; by striking out the item £3,000 on the credit side and increasing it to £7,000, on the ground that the former amount is a fictitious and insufficient valuation placed on the farm . . . .

and that the latter amount is the true and *bonâ fide* valuation thereof; also that the said defendant has not accounted in the said account of his administration for certain 12 silver spoons, 2 dozen silver forks and 150 pieces of china plate found by him in the said estate: also that the distribution of the said account shall be altered accordingly.

To compel one's agent to render a full account of his administration of an estate, etc.

. . . . the plaintiff claims a true and full account from the defendant of his administration of the said estate, as represented by the plaintiff, of all moneys and securities received by him, and of all moneys disbursed by him as such agent for the plaintiff, supported by proper vouchers: to debate such account before the Court, and to pay over to her, in his said capacity, such sum of money as shall be found to be due by him to her, together with the interest thereon, at six per cent. per annum, from the dates of the receipt by him of the respective amounts: and also to give up all documents and papers belonging or having reference to the said estate.

To compel a co-executor to join in framing an account etc. of their administration of the estate they represent.

Command A.B. . . . . of . . . . in his capacity as co-executor testamentary with C.D. of . . . . of the estate of the late E.F. of . . . . that within etc. . . . . to answer his said co-executor C.D., in an action wherein the said plaintiff in his said capacity claims that the said defendant, in his said capacity, may be ordered and condemned to join him in framing a full and true account, supported by proper vouchers, of their whole administration and proposed distribution of the said estate; to sign such account, lodge it with the Master, and to do all things necessary to the due and proper liquidation of the said estate: the said C.D. being ready and willing, and hereby again offering, as he has repeatedly offered, to do everything requisite on his part to get the said estate finally liquidated.

To amend a Liquidation and Distribution Account.

. . . . claims that the Liquidation and Distribution Account . . . . framed by the said defendant on the . . . . day of . . . . in his said capacity of his administration of the said estate, may be amended by disallowing on the debit side the following items (*here insert them*) on the ground that they are not of right chargeable against the said estate: and to reduce the following items (*name them*) on the ground that they are excessive for the nature and kind of work done for the estate. To bring up on the credit side of the said account the proceeds of certain ox-hides, whipsticks, 2 horses and a cart, sold on the Parade, on the . . . . day of . . . . and which belong to the estate; and to account for a debt due by A.P. to the deceased for £300:—And in the distribution of the account to award to L.M. the sum of £ . . . . being the proceeds of the

horse "Napoleon," sold without giving him the option of electing a horse as directed by the will of the deceased: and also to award him the whole of the proceeds of the last fruit and wine crop, under the bequest of the usufruct of the farm "Thorney-rock," on the farms at the time of the testator's death.

For instalments due on conditions of sale, and offer of transfer.

. . . . claims the sum of £ . . . . sterling, being for the 1st, 2nd, 3rd, 4th, and 5th instalments of £ . . . . sterling each of the purchase money of a certain farm called . . . . situate in the division of . . . . bought by the said defendant from the said plaintiff for the sum of £ . . . . sterling due upon and by virtue of certain conditions of sale bearing date the . . . . day of . . . . signed by the said defendant, together with the interest on the whole purchase amount from the . . . . day of . . . . at the rate of six per cent. per annum . . . . ; the said plaintiff being ready and willing, and hereby offering in case of payment and compliance with the said conditions of sale to give transfer and conveyance of the said farm.

To give transfer and offer to pass bond in terms of conditions of sale.

. . . . claims that the defendant be ordered forthwith to give transfer and conveyance to him of a certain house and premises situate in . . . . street in . . . . sold by the said defendant to the said plaintiff on the . . . . day of . . . . for the sum of £ . . . . sterling in terms of a certain deed of sale and purchase of the said house bearing date the . . . . day of . . . . signed by the said plaintiff and the said defendant, the said plaintiff being ready and willing and hereby offering in case of compliance with the said deed of sale, to pass a bond upon the said house, as a first mortgage, for the sum of £ . . . . sterling being the balance of the purchase money aforesaid.

To take transfer.

. . . . claims that the defendant be ordered forthwith to take transfer of the farm Driefontein, situate in the district of . . . ., and purchased by him, from the plaintiff, for the sum of £ . . . ., in terms of a certain contract of sale and purchase between them, bearing date the . . . . day of . . . ., and which said transfer the said plaintiff hereby offers, and tenders to pass; also that the said defendant be condemned to fulfil the terms and conditions contained in the said contract, and by paying the portions of the purchase amount therein mentioned, on taking transfer, and by passing a first mortgage bond on the said farm for the balance.

To give tranfer where money has been paid.

. . . . claims that the defendant be ordered forthwith to give transfer and conveyance to him of a certain farm called . . . . situate in . . . . and purchased from him, on the . . . . day of . . . . for the sum of £ . . . . sterling and which said sum has been duly paid to the said defendant.

To compel joint owners of a farm to partition it.

. . . . claims that the defendants be ordered forthwith to join him in making a fair and equitable partition of the farm called . . . . situate in the division of . . . . according to their respective shares and now held by them all in undivided parts or shares; also that the said defendants be ordered to join the plaintiff in giving each other divisional transfers according to the diagram to be framed of each one's portion or share.

Undue preference.

. . . . in his capacity as trustee of the insolvent estate of . . . . claims to have a certain mortgage bond passed by the said insolvent, on the . . . . day of . . . . to the said defendant, for the sum of £ . . . . sterling set aside on the ground that when the said insolvent passed such bond, he contemplated the sequestration of his estate as insolvent, and intended to prefer the said defendant before his other creditors, and that the said bond is, in terms of the 84th section of the Insolvent Ordinance, an undue preference.

Undue preference with forfeiture of rights to prove.

. . . . in his capacity etc. (*here follow preceding form*) that the said Bond is, in terms of the sections 83, 84 and 88 respectively of the Insolvent Ordinance, an undue preference and obtained through a collusive arrangement, mutual understanding, and common consent, and that the said proof may be set aside as null and void, and that the said defendant may be declared to have forfeited his right to prove against the said insolvent estate any claim whatever in respect of the said mortgage bond, or in respect of any debt or claim for which the same may have been passed.

To have a deed of transfer declared void for undue preference and forfeiture of claim on estate.

. . . . claims to have it declared that a certain transfer, or alleged transfer and conveyance of a certain farm called . . . . situate in the district of . . . . passed by the said insolvent to the said defendant on the . . . . day of . . . ., may be cancelled and declared null and void on the ground that the said insolvent at that date contemplated the sequestration of his estate as insolvent, and intended thereby to prefer the said defendant, who was then a creditor of his, over his other creditors; or otherwise to pay to the said plaintiff, in his said capacity, the sum of £ . . . . sterling as and for the value of the said farm; also that the said defendant may be declared to have forfeited in regard to the said insolvent estate the amount which he shall be found to have been unduly preferred, as aforesaid.

Damages for wrongful diversion of water.

. . . . claims the sum of £ . . . . sterling as and for compensation in damage sustained by reason that the defendant did on the . . . . day of . . . . wrongfully and unlawfully divert a certain stream of water called . . . . river situate in the district of . . . . and which stream ought of right to flow through the farm . . . . belonging to the said defendant to the farm . . . . belonging to the said plaintiff, free and uninterruptedly, on Tuesday and Friday of every week calculated from 12 o'clock on Monday night to 12 o'clock on Tuesday night, and from 12 o'clock on Thursday night to 12 o'clock on Friday night, and so on throughout the whole and every succeeding year.

Against a Municipality for damages for unlawfully breaking open a certain dam.

. . . . claims the sum of £ . . . . sterling as and for damages sustained by him by reason that the said Municipality did on divers occasions during the month of . . . . 18 . . . . wrongfully and unlawfully break open a certain dam called . . . . situate in the . . . . river, and which had been constructed for the purpose of supplying the erven in the said village of . . . . with water, and thereby preventing the water of the said stream from flowing, as heretofore, to the erven belonging to the said plaintiff, and causing grievous injury to him by preventing him from irrigating and watering the standing crops on the said erven.

Slander (verbal injury).

. . . . claims the sum of £ . . . . sterling as and for compensation in damages sustained by him by reason that the said defendant did on or about the . . . . day of . . . ., at . . . ., and in the presence and hearing of . . . . and others, speak of and concerning him the following false, scandalous, malicious, and defamatory words in the Dutch language, viz. (*here insert the words complained of*), which being translated into English are as follows (*here insert the English translation*).

Slander by innuendo.

[Begin as above] . . . ., in the presence and hearing of . . . ., spoke of and concerning him the following false, scandalous, malicious, and defamatory words "die oû lig zy ellenboog zoo baja dat hy heel dag daarvan slaap," which being translated into the English language is, "the old (man) lifts his elbows so often that he consequently sleeps the whole day," but the general meaning of this expression or term in that part of the country where it was uttered, and among those who are in the habit of using it, is that "he (the plaintiff) drinks very hard, and that he is continually dead drunk," and in this sense the defendant so used and meant it, and the parties who heard him speak, so also understood him.

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farm "Jakhalsfontein," adjoining the said farm "Koekoe," belonging to the defendants, and took them to the pound of . . . . at . . . . and that on the way he negligently allowed the cattle to get mixed with certain cattle of . . . . which were affected with lung-sickness, in consequence of which the plaintiff's cattle also became infected with that disease, and . . . . of them died thereof: [The said C.D. and E.F. are only made co-defendants in order to give them notice of this action, and thus to have the record complete, because they hold the farm "Koekoe" in undivided shares with the said A.B.; but no damages or costs are claimed from them if they do not enter any defence to the action.]

To remove a certain wall round a spring: and for declaration of rights as to spring, etc.

. . . . the plaintiff claims that the defendant be ordered and condemned forthwith to remove a certain wall erected by him round a certain spring, or fountain, commonly called and known by the name of "Hartebeestefontein," situate on the boundary of the farm "Rhebokspoort," the property of the plaintiff, in the district of . . . . and some vacant Government land adjoining thereto, and which fountain, or spring, belongs to the plaintiff: and that the said defendant be interdicted from again interfering with the free and uninterrupted use and usufruct of the water in the said fountain: also for a declaration of rights as to the water of the said fountain.

Recovery of goods by a trustee.

. . . . plaintiff, in his said capacity, claims that the said defendant be ordered and condemned to restore, and to give up to him, certain goods and merchandise, wrongfully and unlawfully taken possession of by the said defendant who removed them from the premises of the said insolvent, which belong to his estate, and which the said defendant was requested but refused to restore, and unjustly detains: or in default thereof to pay the sum of £ . . . . being the value of the said goods and merchandise.

To declare a deed invalid.

. . . . plaintiff claims that a certain notarial deed, bearing date the . . . . day of . . . passed by . . . . in favour of . . . ., which purports to settle the right of succession of the priesthood in a certain mosque called . . . . and situate in . . . . and belonging to the Mahomedan community of that part of the town, shall be set aside and declared null and void, on the ground that the parties to the said deed had no authority or right to enter into any such deed, or to make any arrangement as to the officers of the said church, without the consent of the senior priest for the time being in charge of the said mosque, together with his gatieps and bilaals, which consent has not been obtained.

To remove a building, and for ejectment from land.

. . . . claims that the defendant may be ordered, and condemned forthwith, to remove a certain building put up by him on the erf, or certain piece of ground, of the plaintiff's situate in the village of . . . . and which building he was permitted by plaintiff to erect on certain conditions, in terms of certain plans and specifications, bearing date the . . . . day of . . . . but which building is not in terms of the said plans and specifications, and is otherwise badly erected, and of bad workmanship, and of inferior materials : and failing to remove the said building, the plaintiff shall do so at the expense of the defendant, and retain the materials thereof, till he is paid :—Also that the said defendant may be ejected from the use and occupation of the said erf, because he has broken the terms of the lease thereof, bearing date the . . . . day of . . . . in that he allowed people of doubtful character to assemble and meet there, on the pretence of having prayer-meetings, but in reality for immoral purposes : also for a cancellation of the said lease, for the same reasons as on the grounds of the ejectment.

Purchase of oxen from an auctioneer.

. . . . the plaintiff, a licensed auctioneer, claims from the defendant payment of the sum of £. . . . sterling being the purchase amount of certain . . . . oxen bought by the said defendant from him on the . . . . day of . . . . at a public auction, held by him, on the farm "Verneuk" in the district of . . . . for account of one S.P. : together with the interest thereon, at the rate of six per cent. per annum, from the . . . . day of . . . . to the day of payment, in terms of the conditions of sale, read at the time, previous to the sale.

To have the boundary lines of several farms ascertained.

. . . . claims to have the original and proper boundary lines between the several farms "Patkos," "Kalkoen," and "Pampoenkraal," of the defendants, abutting on the farms "Seering" and "Poespasvlei" of the plaintiff, respectively ascertained and adjudged and marked, if necessary, by proper and permanent beacons and landmarks.

To have a bond cancelled on the ground of forgery.

. . . . claims that a certain mortgage bond for the sum of £ . . . . sterling dated the . . . . day of . . . . and registered against the said plaintiff, and alleged to be passed under and by virtue of a certain power of attorney, purporting to be granted and signed by the said plaintiff on the . . . . day of . . . . authorizing the passing of the said bond, and by which a certain farm called . . . . situate in the district of . . . . is hypothecated by the said bond, shall not be cancelled on the ground that the signature to the said power is forged.

Damages through defective pipes and leaky cask of a neighbouring house

. . . . claims payment of the sum of £ . . . . sterling as and for damages sustained by reason that the defendant failed to keep his pipes, used for conveying water into his house adjoining that of the plaintiff in . . . . street, in this city, as also all sinks, reservoirs, tanks, and receptacles for water, in and about the said house, in such good order and repair as to prevent the water from escaping from the said pipes and receptacles : and the water consequently escaped and soaked, oozed, and penetrated through a certain wall between the property of the said plaintiff and the said defendant, by reason of which a great number of the plaintiff's books and engravings, as well as the walls and the paper covering the walls, were wetted, spoiled and damaged.

Damages for malicious prosecution and false imprisonment.

. . . . claims the sum of £ . . . . sterling for damages by reason that the defendants on the . . . . day of . . . . falsely and maliciously and without reasonable and probable cause gave information on oath against him (the said plaintiff) and charged him with having committed the crime of arson, and upon such charge the Magistrate of . . . . granted a warrant for his apprehension ; and he was arrested and taken before the said Magistrate, who held a preparatory examination and committed him for trial, and he was imprisoned for . . . . days, when the Attorney-General declined to prosecute him for the said crime, and the prosecution was ended and the defendant discharged.

To recover the amount of a fire policy.

. . . . claims from the defendant company the sum of £ . . . . sterling, being the amount of a certain policy of insurance, dated the . . . . day of . . . . effected upon the furniture and wearing apparel of the said plaintiff contained in a certain building situate at . . . . and occupied by the said plaintiff as a dwelling-house, which furniture and wearing apparel were destroyed by fire on the . . . . day of . . . .

For assault.

. . . . claims the sum of £ . . . . sterling for damages by reason that the defendant did on the . . . . day of . . . . and at . . . . wrongfully and unlawfully assault and beat the said plaintiff, and struck him divers blows with an iron belaying pin on various parts of his person, and presented at him a pistol, and otherwise assaulted, beat and injured him, whereby he became sick and wounded and was for a long time unable to transact his business, and incurred expense for nursing and for surgical and medical expenses.

Assault and malicious prosecution.

. . . . claims the sum of £ . . . . sterling for damages sustained by reason that the defendant on or about the . . . . day of . . . ., and at a place commonly known as the Cricket Ground in or near the village of . . . ., did without any lawful cause strike and beat the plaintiff with a stick on his collar-bone, shoulder, and arms with such force and violence as to cause the stick to break twice in his, the defendant's, hands, and did also then and there otherwise seriously and violently injure and assault the said plaintiff: also that the day thereafter the defendant contriving and maliciously intending to injure the plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy and disgrace, did maliciously, wrongfully, and unlawfully cause a process to be issued out of the office of the Resident Magistrate of . . . . for contravening the 13th section of Ordinance 25 of 1847, alleging in such process that the plaintiff did wrongfully and unlawfully resist and assault A. . . . ., a police constable then employed in the execution of his duty, and the trial of which cause lasted two days, during which time the plaintiff was virtually a prisoner and had to stand in the criminal box, but was allowed by the Magistrate to be at large during the intervals of the time upon the undertaking of his attorney . . . . to appear when called upon, and at the conclusion of the said trial the plaintiff was acquitted.

To rescind an award and a judgment of the Court thereon.

. . . . claims that a certain award bearing date the . . . . day of . . . . made by . . . ., as umpire, under and by virtue of the deed of submission between . . . . three of . . . . the plaintiffs, and the defendants, dated the . . . . day of . . . ., be set aside, and the judgment of the Court thereon bearing date the . . . . day of . . . ., making the said award a rule of Court, be rescinded and annulled, and to have the plaintiffs restored to the same rights as they would have enjoyed if the said award had never been published and the said judgment had never been delivered, on the ground that C., one of the plaintiffs, as owner of the adjoining farm X, is entitled to the joint use and usufruct of the spring "Steembokskuil" on the farm "Platklip" belonging to the other parties to this suit, and that he was no party to the deed of submission for the division of the water as to this spring: also that as regards the other plaintiffs, the umpire orally gave and explained his award that a certain valley called "Poespasvallei" shall be equally divided between all the co-proprietors, whereas the award gives one half of the valley to two of the defendants, and the remaining half to the first three plaintiffs, and that this alteration in the award was fraudulently made by . . . . the agent of the defendants, with the connivance of the said umpire, and that the plaintiffs were not aware of this until after the award had been made a rule of Court.

Wrongful dismissal.

. . . . claims the sum of £ . . . . sterling damages for wrongful dismissal from the office of superintendent of . . . . on the . . . . day of . . . . contrary to the terms and conditions upon which he had been engaged and appointed; and he had undertaken and already entered upon the performance of the duties of the said office.

Breach of contract.

. . . . claims £ . . . . sterling damages for breach of the contract between the plaintiff and the defendant dated the . . . . day of . . . . by which, in consideration of certain services to be rendered and performed by the plaintiff as an actor in certain theatrical performances managed by the defendant, the defendant promised and agreed to pay to the plaintiff salary for such services at the rate of £ . . . . per week, and also certain benefits, for the period of six months calculated from the date of the contract, but since the . . . . day of . . . . he has prevented the plaintiff from continuing to perform the services and duties under the contract and has deprived him of his salary and profits.

Unskilful medical treatment.

. . . . claims the sum of £ . . . . sterling for damages by reason that the defendant holding himself out as a skilled oculist and aurist on or about the . . . . day of . . . . agreed with the said plaintiff for the sum of £ . . . . sterling, which was duly paid, to cure the said plaintiff of a partial deafness from which he was suffering, but which he, the defendant, not only wholly failed to effect, but so negligently, unskilfully and improperly conducted himself in and about the said treatment that the hearing of the said plaintiff became seriously impaired and the said plaintiff suffered great pain, and became much more deaf than before, and has otherwise been injured.

Trespass and declaration of rights.

. . . . claims the sum of £ . . . . sterling for damages for divers acts of trespass committed by the defendant during the year . . . . and more especially that on or about the . . . . day of . . . . he unlawfully entered upon the farm . . . ., situate in the division of . . . ., the property and in the possession of the said plaintiff, without the leave or licence and against the will of the said plaintiff, and did on the said divers times traverse and trample in divers directions the said farm, and disturb the cattle and stock and the domesticated ostriches of the said plaintiff; he illegally claiming to do so by virtue of a right of public way upon and over the said farm, which he alleges to exist in his favour and that of other members of the public. And also that it may be declared that the defendant has no right of way either as a member of the public or in any other capacity over the said farm.

For the recovery of certain sheep wrongfully removed, and obtained, or stolen, and for damages for unlawful detention.

. . . . claims the recovery, or restoration, of certain 500 sheep wrongfully and unlawfully taken and carried away by the defendant on or about the . . . . day of . . . . from the farm of the plaintiff called . . . . in the division of . . . . which said sheep the defendant has detained and refused to deliver up, or any of them: or, in default thereof to pay their value, the sum of £ . . . . sterling. And further that the said sheep have deteriorated in value, and the plaintiff has sustained further and other damages to the extent of £ . . . . sterling, which said sum the plaintiff hereby also claims the payment of, for the deterioration and unlawful detention as aforesaid.

To refund money under the 90th section of the Insolvent Ordinance.

. . . . for the recovery of £ . . . . sterling, being the amount of a certain promissory note made and signed by the said insolvent, before his insolvency, on the . . . . day of . . . . and payable on the . . . . day of . . . . in favour of one B., or order, and by him endorsed in blank, and that the said insolvent prior to his insolvency paid and satisfied the plaintiff the amount of the said promissory note, and the plaintiff delivered up the said promissory note to the said insolvent, but the said trustee has since the said insolvency instituted an action against the said plaintiff under the 84th and 88th sections of the Insolvent Ordinance for the recovery of the amount of the said promissory note, on the ground that the payment to the plaintiff was an undue preference, and he recovered judgment, but it was decreed that the said note was not received through a collusive arrangement, mutual understanding or common consent, under the 88th section, and that the said trustee had to give the indemnity required under the 90th section of the said Ordinance, which said amount was on the . . . . day of . . . . duly paid by the plaintiff to the said trustee, on his giving the indemnity required by the said section.

To recover money paid under mistake of fact.

. . . . claims the refund of the sum of £ . . . . sterling being the amount paid by the plaintiff to the defendant, in excess of, and upon the false representation made by the defendant to the plaintiff, that the usual and customary charges for certain hire of horses, wagons, and carts for the conveyance of passengers from . . . . to . . . . and back, is the sum of £ . . . . and upon the good faith of which the plaintiff paid the said defendant the said sum, but which the plaintiff now discovers is in truth and in fact false, and that the charge is wholly excessive, and contrary to the usual custom, and that in fact the charge of £ . . . . is a fair and reasonable charge for such work.

To remove certain obstructions in a certain thoroughfare.

. . . . claims that the defendant may be ordered and condemned forthwith to remove certain gates or obstructions placed by him in a certain public thoroughfare, called "Doortogt," and by which the free and undisturbed use of the said thoroughfare is disturbed, and the plaintiff, among others, is prevented from freely, and without interruption, at all times passing the said spot.

To pay money received and not accounted for.

. . . . claims payment of the sum of £ . . . . sterling, being the total amount received, so far as has hitherto been traced, by the defendant, at different times, during this year, from various debtors of the plaintiffs, and which he has failed to account for, and to pay over to the plaintiffs, together with the interest thereon, at the rate of six per cent. per annum, from the dates of the receipt by him of the several sums to the day of payment to the plaintiffs.

For the purchase price of shares.

. . . . claims payment of the sum of £ . . . . sterling, being the purchase price of certain . . . . shares in the (. . . .) Worcester Exploration and Gold Mining Company (Limited) bought by the defendant from the plaintiff on the . . . . day of . . . . at £ . . . . sterling per share, which shares the plaintiff hereby offers and tenders to deliver up on payment of the purchase amount.

For a refund of conduct money paid to a witness: and for damages for his non-attendance, &c.

Edward the Seventh, by the Grace of God of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To the Sheriff of the Colony of the Cape of Good Hope, or his lawful Deputy—Greeting.

Command A.B. . . . .
of . . . .
that within . . . . days after the service of this summons, he cause an appearance to be entered in our Supreme Court of our said Colony, at Cape Town, to answer C.D. of . . . . in an action wherein the plaintiff claims payment :—

1st. Of the sum of £ . . . . being the sum paid to him on the . . . . day of . . . . by H. . . . . of . . . . on behalf of the plaintiff, by way of conduct money, on the service on him of a certain subpœna in a case then pending in this Honourable Court, wherein the said plaintiff was the plaintiff, and one A.S. . . . . of . . . . was the defendant, which said subpœna commanded the said C.D. to appear before this Honourable Court, on the . . . . day of . . . . to give evidence in the

said case, but which subpœna he disregarded, and failed to attend at the trial.

2nd. The sum of £ . . . . being the costs and charges incurred by the said plaintiff, in and about issuing the said subpœna, and to have same served on the said C.D., and which by reason of the default as aforesaid, of the said C.D., to attend the trial, were uselessly incurred by the said plaintiff.

3rd. The sum of £ . . . . as and for damages sustained by the said plaintiff by reason of the defendant's non-attendance at the trial as aforesaid, as the said defendant knew he was subpœnaed to prove (*state what, for instance*) the trespass complained of in the said action, which was dismissed for want of this proof.

4th. With costs of suit :—

As it is said, &c.

A Circuit Court summons.

In the Circuit Court for the District of . . . .

Edward the Seventh, &c.

Command A.B. of . . . .

that he appear before our Judge of our ensuing Circuit Court of the District of . . . . of our said Colony of the Cape of Good Hope, to be holden at . . . . on the first day of the sitting of the said Court, at nine o'clock in the forenoon, to shew wherefore (*here follow any of the forms of Supreme Court summonses*).

Wherefore the said plaintiff prays that the said defendant may be adjudged (*here set forth the plaintiff's prayer, as in conclusions of declarations of actions, for instance*) to pass transfer in terms of the said conditions of sale and purchase; and to pay the costs of suit; and return you then and there this summons with whatsoever you have done thereupon.

Witness—The Honourable . . . . one of the Judges of the Supreme Court of our said Colony, at . . . . the . . . . day of . . . . in the . . . . year of our reign.

. . . . . .

Plaintiff's Attorney.

. . . . . .

Clerk of the Resident Magistrate.

Notice to annex to Circuit Court summons.

Take notice that you are at liberty, either personally or by your attorney or agent, at any time not later than three days before the day specified in the annexed summons for your appearance before the Circuit Court, to enter your appearance with the clerk of the Resident Magistrate for the district of such Court, and thereupon to confess or deny the claim or demand of the plaintiff, and that you may then make and state to the

said clerk any claim which you have against the said plaintiff; and that, if you shall then confess to the said clerk the whole claim or demand of the said plaintiff, and shall not make any counter-claim against him, it will not be necessary for you to appear before the Circuit Court, either personally or by your attorney or agent, and final judgment will be given against you by the said Court according to such your confession.

Dated at . . . . this . . . . day of . . . .

To

A.B.

The above defendant.

. . . . . .

Plaintiff's Attorney.

CHAPTER IV.

PROVISIONAL SENTENCE.

A VERY few words as to the origin of provisional sentence must suffice for this chapter.

Namptissement, the original technical term used in the practice, and also sometimes called *Handvulling*, is a provisional payment by means of an interlocutory judgment, and by which the defendant, if he does not deny the debt, is condemned, provisionally, to pay the sum subject to security *de restituendo*.

In course of time this technical term was gradually dropped by practitioners in Holland in favour of the words *Provisie* or *Provisioneel*, or *Provisie van Namptissement*, and hence the use of the term Provisional Sentence in our practice.

It is a disputed point among jurisprudents whether the doctrine of provisional sentence was introduced into the judicial practice against the Roman law, or in conformity with it.[1] But whatever may be the correct conclusion on this controverted point, this is, however, clear, that *Namptissement*, as subsequently developed, was introduced from France into Holland in the sixteenth century; and, as it was found to be very convenient, it was therefore adopted in the judicial practice.

The object with which *Namptissement* was introduced

[1] Van Leeuwen, 4, 15, 3, and see the arguments *pro* and *con* in the "Bellum Juridicum," or "Oorlog der Advokaten," cases 45 and 46 *et seq.*; v. d. Keessel, 527; Lybrecht, Vol. II., Ch. 42, § 1.

into Holland was chiefly (as some of the writers say) to check

"cunning, fraudulent, and unwilling debtors who seek to deprive their creditors by continuous delay and sinister proceedings in the payment of their lawful claims, and consequently by this process not only to force such evil disposed debtors to an earlier payment, but also by means of the speedy remedy of the *Namptissement* to operate against the futile and dilatory pretensions of such debtors to the benefit thereby of lawful creditors."[1]

For many years there was in Holland great diversity of opinion among the advocates for and against the doctrine of provisional sentence, as to what documents were, or were not, sufficient for provisional sentence, and, consequently, two contradictory systems prevailed in the practice. The one party favourably regarded the doctrine of "Provision," and contended that being once in possession of the signature of the defendant there was no defence against the provisional claim; while the other party, who thought less favourably of provision, maintained that immediately the liquidity of the debt appears doubtful no provisional sentence should be granted. Later writers, however, have held both extreme views to be erroneous, and the correct doctrine may be said to be finally settled and embraced in the two following rules:—

I. *Provisional sentence should never be granted in favour of the plaintiff unless he is provided with a liquid proof of his demand; for example, the most usual proof is on a written undertaking, or acknowledgment of debt, signed by the debtor.*

II. *On the contrary, in order to oppose provisional sentence, the defendant must be provided with and produce such counter proofs as shall appear to the Court to be of that importance that the probability of success in the principal case is against the plaintiff.*[2]

The earliest legislative enactment in Holland on the subject will be found in the Placaaten of the 20th August, 1531, G. P. B., Vol. 2, p. 703, § 119, of the 21st December,

[1] Kersteman, ch. 22, p. 336.

[2] Jud. Prak., Vol. I., Bk. 2, Ch. 6, § 13, and his Laws of Holland, Bk. 3, Pt. 1, § 12; Sande, 1, 8, 3; Kersteman, Ch. 22, p. 338.

1579, p. 762, §§ 7, 10, 11; of the same date, p. 767, §§ 8, 11; and of 1st April, 1580, p. 695, §§ 1, 3, 6, 10.

In these Placaaten it is laid down as a general rule that provisional sentence is given upon such documents as shall make it appear that the debtor has undertaken, by his signature, to pay a certain sum of money, or acknowledged a particular debt; and that every such undertaking to pay, or acknowledgment of debt, signed by the debtor or by his order, is presumed to be genuine and legally valid. And after the defendant has been duly summoned and does not appear to deny his signature, and the document is shown to be primâ facie *valid, the Court will, without further proof required, grant the decree of provisional sentence on the mere production by the plaintiff of the documents upon which he sues.*

The general principles enunciated in these placaaten are still in force in our practice.

The term *liquid* is applied to a debt which a person has acknowledged in writing to be due by him; *illiquid* when there is no such acknowledgment. In the former case there is *primâ facie* evidence of the debt, and therefore it requires no proof; in the latter case proof of the debt is required, for until proved the debt is not presumed to be due.

An essential part of the definition of *Namptissement* is payment under security *de restituendo*, that is, when the defendant, having been condemned to pay the provisional judgment, pays only on the security being given by the plaintiff to refund the principal and interest, if afterwards, at the trial, it should appear on the merits (or, to use the technical expression, *in the principal case*) that the debt was not legally due.[1] The plaintiff cannot give any security he likes, but must give adequate and approved security that the money will be forthcoming on the reversal of the provisional sentence. But if the defendant does not intend to dispute the sentence, and takes no proceedings to upset it, then there is no necessity for him to demand, nor for the plaintiff to give, this security; and where he has consented to

[1] Jud. Prak., 1, 2, 7, 13; Kersteman's Woordenboek, Tit. "Namptissement," and Grotius, 3, 5, 7.

judgment, the decree becomes *ipso facto* final, and he is debarred from taking proceedings to upset it.

Should the defendant proceed with, and be successful in, the principal case, he is entitled to the restitution of the costs paid by him to plaintiff in the provisional case. The costs of the action in the principal case must depend upon the nature of each case, and follow the usual rule in such cases. The defendant is entitled also to interest on the amount paid by him to plaintiff from the day he paid it to the day the plaintiff returns it by order of the Court.[1] We thus see that the sentence or decree is provisional, and that the payment also is provisional; which means that both may be set aside if, on the trial of the principal case, judgment shall be given for the defendant, or the debt sued on shall be found not legally due.

On the old principle that the holder of a note is *primâ facie* the owner of it, it was allowed by our former practice to sue, in provisional sentence cases, in the name of a fictitious plaintiff, called a "*nominal* plaintiff." It was an ancient privilege when the real owner of the note for whatever good reason to him did not wish to appear as plaintiff against, perhaps, a relative or friend. But this privilege is now tacitly repealed by the 27th section of the Bills of Exchange Act No. 19 of 1893. So also under Dutch law and our former practice, a person could not sue upon a Bill of Exchange payable so many days after sight until the day of payment had arrived and payment had been refused although the bill had been refused acceptance. But now upon refusal of acceptance the holder can at once sue the drawer and endorsers.[2]

In illustration of the principles contained in the two fundamental rules above mentioned as to what documents are liquid and sufficient for a provisional claim and what are not, a few examples are here given of cases, *pro* and *con*, decided in this Colony.

[1] Sande, 3, 14, 12, and Merula 4, 33, 3.
[2] § 41 of said Act.

DOCUMENTS SUFFICIENT "PER SE."

I. On an account current signed by the defendant shewing the balance against him;[1] also on an account signed by the defendant as "correct."[2]

II. The "*gross*" of a notarial bond is also sufficient to support a claim for provisional sentence. It is not necessary to produce the bond itself in the notary's protocol except when the defendant denies his signature.[3] In the case of a mortgage bond the counterpart of which has been lost, the plaintiff may either produce an authorized copy from the Deeds Registry Office or the original from that Office, to get provisional sentence.[4]

III. The conditions of sale and purchase signed by the defendant or his sureties are also sufficient to sue them upon for provisional sentence for the whole or any part of the purchase money due;[5] and so also where the condition of a bond was that if the purchaser did not pay the price within —— months the whole amount would be due, provisional sentence was granted, the condition being regarded as not inserted on the ground of its unintelligibility.[6]

IV. So also may provisional sentence be claimed on a judgment obtained in an *inferior Court;* in which case, however, the record or an office copy of the sentence must be produced;[7] but it is not necessary to allege or prove, though it is always done in practice, that a return of *nulla bona* has been made on the writ of execution.[8]

But if the judgment of the Court below is found to be of such a nature as to make it probable that on appeal it would be set aside, provisional sentence cannot be granted on it.[9]

In a footnote to the case of *De Villiers* vs. *Cruywagen*, above quoted, the editor says that the reason why provisional

[1] *Russouw's Trustees* vs. *Becker*, 1 M., 11.
[2] *Miller* vs. *Proctor*, Ibid.
[3] *Denys* vs. *Stoffling*, 1 M., 16.
[4] *Twentyman's Trustees* vs. *Botma*, 6 J., 126.
[5] *Orphan Chamber* vs. *Serteyn and others*, 1 M., 25.
[6] *Joubert* vs. *Downey*, 3 J., 335.
[7] *De Villiers* vs. *Cruywagen*, and *Greig* vs. *De Lima*, 1 M., 28 and 29.
[8] *Tredgold* vs. *Leeuwner*, 1 M., 29.
[9] *Greig* vs. *De Lima;* and *Thorley* vs. *De Lima*, 1 M., 29 and 91.

sentence is sought on a judgment of an *inferior* Court is "because civil imprisonment may be prayed only on unsatisfied judgments of superior Courts." But since then, by the Magistrate's Court Act of 1856, provision has been made for civil imprisonment upon unsatisfied judgments of the inferior Courts.[1]

This is, however, not all, for the three highest Courts have the power to review, and the Supreme Court has frequently reviewed the superannuated provisional sentences of the Circuit Courts, and does this also in a provisional claim.[2] Again, apart from this, the only way to get at the landed property of a defendant to satisfy the judgment of a Magistrate's Court, in the absence of sufficient movables, or to sue for Civil Imprisonment a defendant who has since the return of *nulla bona* to a Magistrate's Court writ removed to another district where the magistrate who tried the case has no jurisdiction, is to sue in a higher Court, by way of provisional sentence, on the judgment; and this is continually done in the Supreme Court.[3]

In one case in the E. D. Court a rule *nisi* was granted calling upon the defendant to show cause why his immovable property should not be attached to satisfy the Magistrate's judgment,[4] but on a similar application being made to the Supreme Court, the Court decided that it had no power to grant such an order on a notice of motion, and that a summons must be issued.[5]

V. A contract of lease, whether notarial or underhand, signed by the defendant, is also sufficient to entitle the landlord to provisional sentence for arrear rent.[6] But the tenant cannot set up a counter-claim by reason of non-repair of the premises leased.[7]

VI. Also on a written acknowledgment of the defendant of the receipt of purchase price of goods *to be delivered* the

[1] See Chapter "*Civil Imprisonment.*"

[2] *Orphan Chamber* vs. *Strydom*, 3 M., 417.

[3] See also *Curtis* vs. *Birch*, decided February, 1886, not reported; *Harris* vs. *Blom and another*, 7 J., 41; *Mostert* vs. *Ford*, 17 S. C., 256, and several subsequent cases.

[4] *Perkins & De Savigny* vs. *Dalton*, 3 E. D. C., 301.

[5] *Vos* vs. *Fouchee*, decided May, 1884, not reported.

[6] *Neethling* vs. *Taylor*, and *Truter* vs. *Everest*, 1 M., 30 and 32.

[7] *Fisk* vs. *Hausman*, 8 J., 44.

plaintiff can claim provisional sentence, the *onus probandi* of the delivery of the goods resting with the defendant.[1]

In 1829 the Court granted provisional sentence on a written obligation signed by defendant *ad factum præstandum.*[2] But in *Christie* vs. *Kinnear*[3] the Court held that a judgment *ad factum præstandum* could not form a subject of a provisional sentence.

VII. So also was provisional sentence granted on an acknowledgment of debt, but by which the defendant promised to pay in instalments by deliveries of wood to the value of each instalment;[4] also on the liquidated value of fungibles *to be delivered;*[5] also on a promissory note to be paid in ostrich feathers;[6] also on a promissory note containing the words "on account of property at X," because this did not imply a condition, but was simply a statement for the reason of the note.[7]

VIII. Provisional sentence was given also against defendant for his overdrawn account in the Bank on a written acknowledgment by him of the amount overdrawn.[8]

IX. Provisional sentence can be granted also on an attorney's bill of costs against his client for the amount of the bill as taxed by the taxing officer after due notice of the taxation has been given to the defendant.[9] In such a case the defendant should be called upon also in the summons to acknowledge or deny his signature affixed to the warrant to sue, or defend (as the case may be), or the validity of the debt, and to plead to the provisional claim of plaintiff. But the costs cannot be recovered from a client on a provisional sentence which the opponent in the action had to pay but failed to do so.[10]

X. Provisional sentence has been granted also on a promissory note "for value received against 100 shares Cape Diamond Mining Company," where the summons tendered

[1] *Dreyer* vs. *Roos*, 1 M., 34.
[2] *Somerset* vs. *Maynier*, 1 M., 35.
[3] Decided on 12th May, 1856, not reported.
[4] *Koemans* vs. *Van der Walt*, 1 M., 36.
[5] *Kidson* vs. *Rafferty*, 1 M., 37, and *Letterstedt* vs. *Watney*, 1 M., 16.
[6] *Norgab* vs. *Fryer*, 2 J., 218.
[7] *Shaw* vs. *Adamson and another*, 6 C.T., 106.
[8] *E. P. Bank* vs. *Wallis*, B., 1869, p. 311.
[9] *De Wet* vs. *Meyer*, 1 M., 59.
[10] *Dickson* vs. *Gildenhuys*, 1 M., 60.

delivery of the shares, because the tender of the shares in the summons was made *pari passu* with the claim for payment.[1]

XI. So also can provisional sentence be given on a foreign judgment.[2] But if that judgment has become superannuated it cannot be sued upon here before it has been revived in that country.[3]

XII. So also on a general bond in which the defendant acknowledges himself to be indebted in a specified sum for money advanced, and *to be advanced;*[4] or for goods sold and delivered, and *to be sold and delivered.*[5]

DOCUMENTS INSUFFICIENT "PER SE."

I. It is not permissible to sue for provisional sentence on an *account of commission sales* rendered by a commission agent, shewing a balance in favour of the principal;[6] nor on *account sales* rendered by a consignee.[7] The Court held in these two cases that a mere rendering of an account, with the acknowledgment of the debt, is not a liquid document, and furnishes no evidence that the party rendering the account is indebted to that amount, and that such an account is different altogether from an account in which a balance is brought out as due by one of the parties and which has been signed by him.[8]

II. A mere acknowledgment of a balance of a sum of money due by the defendant is not a negotiable instrument *without a formal cession;* and therefore in such a case only the party to whom it was originally granted can sue upon it in a provisional case.[9]

III. An acknowledgment of debt with a promise of payment in a contingency where *extrinsic proof* would be required,

[1] *Webster* vs. *McKenzie*, 1 J., 349; *Wiarda* vs. *Standard Bank*, 6 J., 326; *Stewart* vs. *Le Sueur*, 7 J., 63; and *Lewis* vs. *Kennerley*, 2 E.D.C., 127. Do not confuse these cases with *Kruger* vs. *Horak*, *infra*, under the heading of "Documents insufficient *per se*."

[2] *Lipman & Herman* vs. *Kohler*, 5 J., 420; *Raaf* vs. *Fitzgerald*, 13 S. C., 1; *Natal Bank* vs. *Woolf*, 7 C. T., 392; *Levy and Co.* vs. *Leopold*, 8 C. T., 170.

[3] *Garlick* vs. *Bavido*, 7 C. T., 159.

[4] *Wessels* vs. *Wahl*, 3 J., 123.

[5] *De Waal & De Kock* vs. *Van Zyl*, 3 J., 188. For an example, *contra*, see *Green & Co.* vs. *Beveridge*, quoted, *infra*, under the next heading.

[6] *Smith* vs. *Southey*, 1 M., 53.

[7] *Trimbey* vs. *Harris*, 1 M., 54.

[8] See also *Russouw's Trustees* vs. *Becker*, and *Miller* vs. *Proctor*, 1 M., 11.

[9] *Reitz* vs. *Kock*, 1 M., 56.

or if made upon a certain condition or under certain circumstances where the proof must also be by *extrinsic* evidence, is not a liquid document, and provisional sentence cannot be claimed upon it.[1] For example, provisional sentence was refused on the following document because it depended upon a contingency or condition which could be proved only by extrinsic evidence :—

"I, the undersigned, A. H——, do hereby acknowledge myself to be really and truly indebted to F. K——, or his order, in the sum of £200 sterling, for value received, which I promise to pay whenever the ground bordering on the farm 'Kameelsbron,' belonging to the said K——, shall be sold, with interest at 10 per cent. per annum.—A. H."[2]

For the same reason provisional sentence was refused on the following document :—

"I, A, bind myself as surety *in solidum* and joint principal debtor for any sum not exceeding £200 due by B to C ;"

because any lesser sum must necessarily be proved by extrinsic evidence.[3] Even the surety to such an undertaking cannot be sued in a provisional claim.

But a promissory note containing an undertaking to pay certain money "on account of property at X" is not a conditional note, as the words inserted were not intended as a condition, but simply as a statement of the transaction which gave rise to the bill.[4]

IV. Provisional sentence cannot be claimed on a document wherein the defendant admits having *stolen* the amount claimed by the plaintiff.[5] Nor is a bond in which the debtor binds himself to *account for* a certain sum, a liquid document and liable to provisional claim ;[6] nor can such sentence be granted when the note says *to be* received in shares.[7]

[1] *Fisher* vs. *Daniel ; Sturt* vs. *Carters' Executor ; Geert* vs. *Van As ; Norten* vs. *Speck and another ; Cloete* vs. *Ekstein ; Norden* vs. *Cauvin*, 1 M., 56, 57, 62, 65, 71 and 80 ; and *Impey* vs. *Levyno*, 1 E.D.C., 284 ; Wass. Jud. Prak., 1, 6, 25.

[2] *Kruger* vs. *Horak*, decided in 1867, not reported.

[3] *Green & Co.* vs. *Beveridge*, 8 J., 45. But do not confuse the cases with those of *Webster* vs. *McKenzie*, and *Lewis* vs. *Kennerley*, under the heading "Documents sufficient *per se*."

[4] *Shaw* vs. *Adamson and others*, 6 C. T., 105 ; Ibid, S. C., 81.

[5] *Barry & Co.* vs. *Manuel*, 1 M., 58.

[6] *Jones* vs. *Dusing*, 1 M., 68.

[7] *Impey* vs. *Levyno*, 1 E. D. C., 284. See the difference between this case and those of *Webster* vs. *McKenzie* and *Lewis* vs. *Kennerley*, under the heading "Documents sufficient *per se*."

Provisional sentence has been refused on the following document—

"I, A., bind myself as surety *in solidum* and joint principal debtor for any sum not exceeding £200 due by B. to C.," because there is no acknowledgment of any sum due (as was in the cases of *Wessels* vs. *Wahl;* and *De Waal and De Koch* vs. *Van Zyl*, quoted above under the heading "Documents sufficient *per se*," par. 12), and the document is only signed as security for goods undertaken *to be* supplied.[1]

THE GRANTING OR REFUSING PROVISIONAL SENTENCE FOR OTHER GROUNDS THAN THE QUESTION OF THE SUFFICIENCY OR INSUFFICIENCY OF THE DOCUMENTS SUED ON.

Perhaps it would be more convenient for easy reference if all the examples where provisional sentence has been granted were given under one heading, and those where it was refused under another; but for the purpose of drawing the student's attention at once to the apparent similarity, or diametrically the reverse, of some of the doctrines for and against provisional sentence, they will be so placed as best to meet this object.

In Holland, the *Ledger* of a merchant, as also that of any doctor, or shop-keeper, or public trader, showing a debt due, is considered as liquid as if the debt bore the debtor's signature;[2] but this privilege, accepted in the practice in favour of commerce in Holland (which was formerly a purely commercial country), has never been acknowledged by our Courts here. The reason why I have not been able to trace, but as the Court has from time immemorial declined to grant provisional sentence on a person's ledger, the custom has hardened into law. So also in Holland a document which acknowledges a debt, but does not state the *consideration* given for it, is not a liquid document, and provisional sentence cannot be claimed upon it.[3] But, though formerly our Courts

[1] *Green & Co.* vs. *Beveridge*, 8 J., 45.

[2] Gaill's Obs., 2, 20; Berg's Adv., Bk. 1., Cons. 27, 28 and 29; Huber Hed. Regts., Vol. II., p. 326, n. 39; Schorer on Grotius, 2, 3, 5, 7.

[3] Heineccius Wisselregt, 4, 13.

held the same view,[1] such a document need no longer, in this country, express the value received or considerations given for it; since, from the different circumstances of the Colony, and the manner in which such documents, cheques, and "good-fors" are made use of in the general transactions of business in this Colony, the consideration for value received is implied.[2]

Provisional sentence is usually refused to a swindler, or to the parties in a gambling transaction.[3] It will be refused also where sufficient *set-off* can be proved;[4] also, on a note which has been *novated;*[5] and a verbal agreement to renew, made at the same time as date of note, cannot be set up as a defence to a claim for provisional sentence on the note.[6]

Provisional sentence has been refused also as against a minor, on a notarial lease signed without consent of his guardian;[7] but when the minor has entered into the obligation with the consent of his guardian, which must, however, appear on the face of the instrument, he is provisionally liable:[8] in the same way the Court held that minority was no defence where the minor, with consent of his tutor, went on a trading trip, and while so trading exchanged certain oxen for mules, and gave a promissory note for the difference.[9]

But though provisional sentence has been refused against a minor, it is not to be concluded from this that he will entirely escape payment of the debt. If the plaintiff can satisfy the Court that the lease was for the minor's benefit, then the plea of minority will not avail the defendant. There are several kinds of debts contracted by minors for which

[1] *Berrangé* vs. *de Villiers*, 1 M., 12.

[2] *Rens* vs. *Smith; Brand* vs. *Mulder; Watermeyer* vs. *Neethling, q.q. Denyssen; Prestwich* vs. *Robertson; Collisson & Co.* vs. *Eksteen;* and *Elliott Bros.* vs. *Breda and Beale*, 1 M., 13, 25, 26, 27, 46, 47; and now see Bills of Exchange Act, No. 19 of 1893.

[3] Jud. Prak., Vol. I., p. 207 and 208, and his Laws of Holland, p. 408; see also the cases of *Freshfield* vs. *Harries*, and *Kennel* vs. *Harries*, 1 M., 84 and 85; and *Sonnenberg* vs. *Flower*, B., 1875, p. 4.

[4] *Trustees Vos* vs. *Vos*, 3 J., 320.

[5] *Cannon* vs. *Ford*, 1 M., 95; Sande, 1, 8, 3; and Grotius, 3, 43.

[6] *Simpson, N. O.* vs. *Frank and Nicholls*, 2 E.D.C., 195.

[7] *Gants* vs. *Wagenaar*, 1 M., 92.

[8] Sande, 1, 8, 4; and Wassenaar, Vol. I., Ch. 6.

[9] *Gericke* vs. *Keyter*, B. 1879, p. 147.

they are responsible, even though they act without the knowledge or consent of their guardians; for instance, necessary and reasonable supplies of clothing, food, board and lodging, education, and the books necessary for their studies, &c.

An error in the date of the note is no bar to provisional sentence.[1]

But an allegation that the amount of the note has been altered, and its character changed, without the consent of all the parties to it, is a bar to provisional sentence, and the plaintiff must proceed with the principal case.[2] In case at the trial it should be proved that the amount of the note has been enlarged by one of the parties without the knowledge or consent of the other party, the innocent party to the note is liable to, and the holder can recover from him, only the amount for which the note was originally made, genuinely signed and issued; and the note, as to the original amount, will be held a good note; but as to the rest it is vitiated.[3] But where the maker has himself been guilty of negligence by writing a note in such a way as to leave space for the insertion of words, by which the amount of the note may be increased, the Court will give provisional sentence for the full amount sued for.[4]

If a person signs a note in blank, leaving it to another party to fill in the amount, and he afterwards discovers that the note has been filled up with a larger amount than he thought it would be, or than they agreed upon, he cannot, upon this ground, object to provisional sentence being granted against him.[5]

So, also, has provisional sentence been given on a bill of exchange, which, though drawn and accepted by *C. H. v. L.*,

[1] *Waters and Herron* vs. *Roubaix*, and *Kilian & Co.* vs. *Tredoux*, 1 M., 42 and 51.

[2] *Rawstorne* vs. *Wolhuter*, 2 M., 267; and *Lyons* vs. *Moroney*, 1 J., 106.

[3] Kist Beginselen van Wisselregt, pp. 162 to 168—an excellent little work; see also *Estate Blackburn* vs. *Landsberg*, decided in Supreme Court in January, 1866, but not reported; and *Kiel* vs. *Clark & Co.*, 2 E.D.C., 108.

[4] *Bernhardi* vs. *du Toit and Tullekin*, 2 J., 359.

[5] Lybrecht, 2, 42, 2; and Wassenaar, 1, 6, 31.

was afterwards altered to *W. F. H. v. L.*, and accepted by him.[1]

The allegation that a note was given for a usurious consideration is no defence against a provisional claim.[2]

If the defendant denies his signature to the document sued on, or the validity of it, it may be proved *instanter* by parol evidence.[3] But if the parol evidence makes the genuineness of the defendant's signature doubtful, then provisional sentence cannot be granted.[4]

On the denial of the signature the plaintiff must produce some evidence satisfactory to the Court that the defendant made the note because the burden of proving the validity of his claim lies upon the plaintiff: after which the defendant produces rebutting evidence.[5]

Besides parol evidence, the defendant's signature may be proved by comparing other writings and signatures of his with the one in question, and also by the fact that at one time or other he has acknowledged it to be his signature.[6]

If the defendant *malâ fide* denies his signature, or, without a reasonable cause, avers that the signature upon the document sued on is not his, then by the Roman law he is liable to a penalty of *double* the amount sued for, and by the Roman-Dutch law to *arbitrary* punishment.[7] In the case of *Denys* vs. *Daniel*,[8] the Supreme Court, on the 10th February, 1835, subjected the defendant to a penalty of *double* the costs, and since then the Court has in all cases of *malâ fide* denial of signature imposed a penalty on the defendant of double the costs. This means double his opponent's costs, not his own.

But parol evidence cannot be admitted in a provisional case to negative the due presentment of a bill of exchange, as appears from the notarial protest. The defendant must go into the principal case, if he wishes to disprove the present-

[1] *Borradales & Co.* vs. *von Ludwig*, 2 M., 247.

[2] *Rens* vs. *Horak*; *Muller* vs. *Redelinghuys and van Reenen*; and *C. of G. H. Bank* vs. *Elliott Brothers and Sutherland*, 1 M., 40, 41 and 102.

[3] *Dieterman* vs. *Curlewis*, and *Norden's Trustee* vs. *Butler*, 1 M., 42 and 52.

[4] *Stell* vs. *de Wet*, 1 M., 93.

[5] *Louw* vs. *Harris and Freeman*, B. for 1876, p. 143; *Blake and others* vs. *Louw*, 3 C. T., 304; *Bright and Boulton* vs. *Durwood's Executor*, 4 C. T., 363.

[6] Wassenaar, Vol. I., Chap. 6, §§ 10, 11 and 12.

[7] Merula, 4, 37, 2, 5; and Wassenaar, 1, 6, 14.

[8] 1 M., 44.

ment;[1] nor is parol evidence or an affidavit competent to prove the dishonour of a bill of exchange,[2] or of a promissory note;[3] nor can an affidavit be produced to prove an endorser's waiver of due negotiation.[4]

Provisional sentence cannot be granted on a bill of exchange which has been transferred to and brought up in a running account;[5] nor if the bill, or promissory note, formed part of the general transactions on *accounts current* between two persons, and is given in temporary satisfaction of the balance against him;[6] but where the bill or note has been credited in the account when made, and debited in the account at maturity, being merely entered in the account rendered to show the transaction between the parties, its liquidity is not thereby destroyed.[7]

Provisional sentences cannot be claimed on a mortgage bond ceded by the mortgagee by a private *underhand and separate* paper. To obtain provisional sentence, therefore, by virtue of a cession, the cession should be made notarially; or, if underhand, then it should be written on the bond.[8] But if at the trial the defendant admits the separate cession to be his, and by his affidavit connects and identifies it with the bond sued on, provisional sentence will be granted against him.[9] An unimportant error, or misdescription, in such cession is no bar to provisional sentence;[10] but an omission of an intermediate cession, erased by cross lines from the copy served on the defendant, is a bar, on the ground of want of material description.[11]

When it is stipulated in a bond that, on failure to pay the interest on the day it falls due, the principal and interest shall be considered due without notice, provisional sentence will, on the non-payment of the interest, be given for the capital and

[1] *Hovil and Mathew* vs. *Poultney*, 1 M., 14.

[2] *De Ronde* vs. *Zeiler*, 1 M., 61.

[3] *Anderson* vs. *Hutton and Woest*; *Meiring* vs. *de Villiers*, 1 M., 75; and *Stellenbosch Bank* vs. *Mader*, B. for 1878, p. 45.

[4] *Trustees of Randall* vs. *Haupt*, 1 M., 79.

[5] *Openshaw, Unna & Co.* vs. *Truter*, 2 M., 252.

[6] *Preuss and another* vs. *Amos*, 1 R., 286.

[7] *Ibid*; *and Horn & Co.* vs. *Hoefer*, 9 J., 207.

[8] *Le Roux* vs. *de Villiers*, B. for 1869, p. 90; and *Bank of Africa* vs. *Harper*, 4 E.D.C., 252.

[9] *du Plessis* vs. *van Blerk*, B. for 1869, p. 68.

[10] *Rens* vs. *Hamman and another*, 1 M., 17.

[11] *Serrurier* vs. *Executors of Cotes*, 1 S., 106.

interest, though the bond contains the usual clause requiring notice to be given calling it up, and though the notice has not been given;[1] but provisional sentence was refused on a bond dated 4th June, claimed to be due by reason of non-payment of interest, payable half-yearly on the 30th June and 31st December, on *the ground that, though one of the dates fixed for payment of interest had passed, a half-year's interest had not accrued by such date*;[2] and provisional sentence was refused also on a bond which contained no prescribed time of payment, the interest being payable annually, and *the bond having been called up within the first year, before any interest had become payable*;[3] and though provisional sentence has been granted for the interest on a mortgage bond, the Court can refuse execution against the landed property specially hypothecated, until the movables shall have been disposed of in the ordinary way.[4] A verbal notice calling up a bond, though formerly held good, is no longer sufficient for provisional sentence. It must be a written notice, and duly proved, generally by an affidavit.[5]

Where an executor has given notice to creditors to lodge their claims, and the mortgagee has done so, the latter can obtain provisional sentence on his bond without giving the notice required by the bond.[6]

Provisional sentence cannot be granted for the *penal stipulation* contained in a bond or promissory note, though it can be for the amount of the bond or note itself, with the interest; as for instance, if a note for a certain sum, to bear interest above a certain rate, contains also a stipulation that, if the note is not paid when due, the maker should pay five per cent. commission besides for collection of the said amount. This condition is a penal stipulation, and therefore not liquid, and consequently cannot be recovered by provisional sentence.[7]

[1] *Faure* vs. *Wright*, 1 M., 21.

[2] *Equitable F. A. and T. Company* vs. *Wainwright*, B., 1879, p. 206.

[3] *Stretton* vs. *Holder*, 4 E.D.C., 321, and *Busk* vs. *Cloete*, 1 M., 15.

[4] *Mutual Life Assurance Society* vs. *Niekerk*, 3 J., 318.

[5] *Nederland's Executor* vs. *Gnade*, 1 M., 18, and *Swellendam Bank* vs. *Volschink*, decided 1865, not reported.

[6] *Southey* vs. *Borcherds Executor of Dormehl*, 1 M., 22.

[7] *Steytler* vs. *Smuts*, 1 M., 40; *Simpson* vs. *Connolly and another*, 2 E.D.C., 130; *Mosenthal* vs. *McKinnon*, 1 J., 235; and *Cape Town Council* vs. *Linder and others*, 6 J., 410.

This penal stipulation must be sued for illiquidly and by way of damages which must be proved.[1] Nor can provisional sentence be granted for amounts claimed for *fines* which did not appear *ex facie* the bond to be payable, but which were mentioned in the rules of the Society.[2]

The acceptor of a bill of exchange cannot sue the drawer for the amount of it in a provisional case, as such a bill affords no evidence that the drawer is indebted to the acceptor, who may have funds of his in his hands.[3]

The word "accepted" written across the face of a promissory note, signed by the party writing it, creates no liquid liability against him, and he cannot therefore be sued on it in a provisional case, as a person cannot be an "acceptor" of a promissory note, and thus, *ex facie* the note, the nature and extent of his liability could not be known.[4] In a bill of exchange, however, it is of course different, and the party "accepting" could be sued personally. But the Court has repeatedly held that the words "I accept to pay" in a promissory note are equivalent to the words "I undertake to pay," and in such a case the party would be provisionally liable, as those words contain an allegation that the defendant undertakes to pay the note.

Nor does the signature of a third party at the back of a promissory note, through whom, *ex facie*, the note cannot be said to have been derived, create a liquid liability.[5]

If the defendant, who has been summoned without any presentment for payment having been made to him, before the issuing of the summons on a provisional note, at once, or without any unnecessary delay, tenders the amount of the note with interest to the plaintiff, or his attorney, he will not be liable for the costs of the summons; and where the plaintiff has refused to accept the tender which the Court has held to be a legal or proper one, the defendant will also be exempted from the costs of the summons, though provisional sentence may be granted against him, and he will moreover be entitled

[1] *Gavin* vs. *Nel and De Jager*, decided in Court of Appeal in 1886, not reported.

[2] *Grahamstown Building Society* vs. *McDonald*, 4 E.D.C., 326.

[3] *Norden* vs. *Stephenson*, 1 M., 63.

[4] *Brink* vs. *Minnaar*, and *De Kock* vs. *Russouw and V. d. Poel*, 1 M., 76 and 78.

[5] *Norton* vs. *Satchwell*, 1 M., 77.

to his costs to bring the fact of the tender to the knowledge of the Court.[1] But the tender, if made to the Sheriff's officer on service of the summons, is bad, unless he was entrusted with the note by the plaintiff to demand payment.[2]

The Court held also in those cases that the service of the summons was itself a sufficient demand for payment.[3]

Formerly provisional sentence could not be granted on an edictal summons of which there is no proof that it had come to the knowledge of the defendant without filing an "*intendit;*" but at the trial no further evidence was necessary than to put in the document sued on.[4] But if there be proof that the citation had come to the defendant's knowledge, then provisional sentence could be granted without filing an "*intendit.*"[5] This practice has for the last few years been simplified, not by virtue of any specially decided case on the point, but because of the Rule of Court 329, in which the principle is settled that where a defendant is in default of appearance to an action for a debt in a *liquidated demand only*, the case can be set down for judgment on the summons without any notice to the defendant.[6] So that *now* provisional sentence can be obtained on the edictal summons without filing an "*intendit,*" whether there is proof or not, that the citation had come to the defendant's knowledge.

Provisional sentence will also be granted against a wife who has become surety for her husband;[7] and against husband and wife on a note signed by both;[8] also against sureties to conditions of sale;[9] also against an insolvent who has given a note after his sequestration;[10] and against a debtor on the part of a creditor who has not signed the deed of assignment.[11]

Provisional sentence has been given with Supreme Court

[1] *Redelinghuys* vs. *Theunissen*, *Orlandini* vs. *Pope*, *Steytler* vs. *De Villiers*, and *Johnson* vs. *Kotze*, 2 M., 258, 260, 284, 286; and *Barry* vs. *Barnes and Needham*, 3 M., 473.

[2] *Brink* vs. *Gough*, 2 M., 256.

[3] But see Chapter "*Actions.*"

[4] *Trustees of Stoll* vs. *Hope and Munro*, 1 M., 139.

[5] *Dunell and Stanbridge* vs. *Van der Plak*, 1 M., 140.

[6] See Chapter "*Defaults.*"

[7] *Nourse* vs. *Steyn, wife of Griffiths*, 1 M., 23.

[8] *Smuts, Louw & Co.* vs. *Coetzee*, B. for 1876, p. 55.

[9] *Orphan Chamber* vs. *Serteyn and others*, 1 M., 25.

[10] *Norden* vs. *Magndas*, 1 M., 45.

[11] *Anderson and Murison* vs. *Dailey and Lutley*, 3 J., 263.

costs where the plaintiff and defendant lived in different towns, though the amount sued for was very small.[1] In this case the Court was disposed to grant only Magistrate's Court costs on account of the debt being so small (£12), but after consultation they held that the legislature had placed this beyond their discretion, and they had no option but to grant Supreme Court costs. Since then there have been many decisions, under similar circumstances, for very much smaller amounts.[2]

Provisional sentence cannot be claimed on a summons when the power to sue is signed by one only of two trustees, nor would his assertion that he signed "for self and co-trustee" be sufficient to obviate the difficulty;[3] and it has been refused also against a person who signed as "Executor *q.q.*" without adding what estate he represents.[4]

Provisional sentence will be refused, if it can be proved by the defendant that the plaintiff had agreed to give him time, *pactum de non petendo*, and not to claim payment till after a certain period, or the happening of a certain event.[5]

Formerly provisional sentence has been refused on an accommodation note paid at maturity by the plaintiffs *who were not parties to the notes*, and they being the purchasers of such an overdue note took it, therefore, subject to all its equities, and had no better title than the transferor, the accommodation maker;[6] and so also was sentence refused though the accommodation note was purchased by the plaintiff before it became due;[7] nor can the plaintiff recover against the accommodation maker where the note has been given contrary to public policy, for instance, in lieu of forged

[1] *A.* vs. *B.*, B. for 1868, 240.

[2] *Sluiter and Neser* vs. *Metcalf*, 1 C. T., 46.

[3] *Est. Trustees Dodds, King & Co.* vs. *Watson*, 1 M., 140.

[4] *Eldridge* vs. *Widow Wicht*, B. for 1870, p. 6.

[5] Sande, 1, 8, 3; and *Roux* vs. *Executors of Roos, Searight & Co.* vs. *Lawton; Dickson, Burnie & Co.* vs. *Lawton; Barrodailes & Co.* vs. *Lawton*, 1 M., 89, 105, 109 and 110; also *Hansen and Schrader* vs. *Pauling*, decided in December, 1885, not reported.

[6] *Clear* vs. *Barling*, 1 J., 401; and *Miller* vs. *Clear and Exor. of Glynn*, 1 J., 407.

[7] *Hudson* vs. *Kirsten*, 1 S., 249; *Piton* vs. *Exors. of Beyers*, B. for 1876, p. 128: *Watson* vs. *Solomon*, B. for 1876, p. 158; *Trustees of Stellenbosch Bank* vs. *Myburgh*, B. for 1876, p. 206; and *Simpson, N.O.* vs. *Naudé*, 2 E.D.C., 192.

notes, or to avoid disclosure of a crime.[1] But now, by the Bills of Exchange Act, No. 19 of 1893, Sec. 26—

"an accommodation party is liable on a bill to a holder for value, whether, when such holder took the bill, he knew such party to be an accommodation or not."

Provisional sentence has been refused also on an account signed by an agent shewing that he was indebted to his principal in a certain sum, but the correctness of which account was disputed by the principal, who yet sued for the amount shewn to be due, and because the summons contained the words—

"without prejudice to any other and further claim which the plaintiff might have against the defendant in respect of over charges and wrongful deductions for commission and interest."[2]

Provisional sentence has been refused, with costs against the plaintiff, because, before issue of summons, he knew that the case could not be decided on provision in consequence of alleged fraud, and thereby unnecessarily incurring costs of affidavits in opposition;[3] and it has been refused with costs, for the plaintiff, when the costs have been incurred through the defendant's improper conduct.[4]

Provisional sentence has also been refused on a summons claiming the purchase price of certain land which had been sold by public auction, the auctioneer representing the land to be near the Retreat Station whereas it was four miles distant.[5]

When the acceptor and the drawer and endorser of a bill of exchange are summoned, provisional sentence will be granted without the production of a protest of presentment or demand for payment having been made to the acceptor;[6] nor is presentment at the specified place of payment necessary to entitle the holder of the bill to maintain action on it against an acceptor for payment.[7]

[1] *Harris* vs. *Exor. of Krige*, 2 J., 399.
[2] *Hiddingh* vs. *S. A. Association*, 3 J., 298.
[3] *Fauresmith Board of Executors* vs. *Hannam, Archibald & Co.*, 3 E.D.C., 127.
[4] *McDonald* vs. *Armstrong & Co.*, 3 E.D.C., 91.
[5] *Crews* vs. *Zweigenhaft*, 8 C. T., 193.
[6] *Muller* vs. *Van Oudtshoorn and Calander*, 2 M., 236.
[7] *Williams & Co.* vs. *Farmer*, 2 M., 238.

But no costs will be allowed for a notarial protest on a summons against the maker of a promissory note where no particular place of payment is mentioned in the note; and where a place of payment is mentioned in the margin, or at the foot of the note, or after the signature, it is considered as merely directory, and no costs of protest will be allowed; but if the place of payment is mentioned in the body of the note, then the costs for protest will be allowed.[1] And the costs of only one protest, not two, will be allowed on two notes by defendant to plaintiff payable at same time and place.[2] No protest whatever is necessary if the note is made payable at the place of business or residence of the plaintiff,[3] and it is immaterial to granting provisional sentence whether the presentment, when necessary, preceded or followed the summons.[4]

Though as a general rule provisional sentence cannot be granted on extracts or copy documents, and the plaintiff is bound to exhibit the original when demanded by the defendant, yet such sentence can be given on an extract or copy of the document which has been *duly collated with the original and authenticated by a notary public* in the presence of a witness. But the plaintiff must prove that the original has been lost through fire, deluge, robbers, or any other misfortune or casualty, and he must undertake also that in the event of the original being afterwards produced he will not claim upon it. Some doubt seems to have existed upon this point among the older writers, but the majority of the later ones are agreed, and among them Vroman, who mentions a case in which the Supreme Court of Holland, in May, 1586, gave provisional sentence on an authenticated copy.[5]

But now, by Sec. 67 of Act 19 of 1893, the holder of a bill may apply to the drawer and compel him to give him

[1] *Hodgson & Co.* vs. *Nefdt*, B. for 1876, p. 163.

[2] *Ryall and King* vs. *Hann*, 3 E.D.C., 300.

[3] *Schaffner* vs. *Myburgh*, B., 1876, p. 14.

[4] *Oriental Bank Corporation* vs. *Shaw and Honey*, 1 E.D.C., 187.

[5] Bellum Juridicum, Cas. 52 and ded. 65; Sande, 1, 8, 3; Merula, 4, 37, 2, 3, e, & g., and 4, 66, 4, 2, 3, 4, and notes; Loenius, 36 and 98; Vroman, 3, 15, 4, and notes; G. P. B., Vol. 2, p. 698, § 18, and p. 719, § 68; Kersteman, Chap. 22, p. 339; Lybrecht, Vol. 2, Chap. 42; Huber Hed. Regts., Vol. 2, Chap. 26, §§ 30 to 39; *analogy,—Twentyman's Trustees* vs. *Botma*, 6 J., 126.

another bill of the same tenour. Hence, by inference, from this and the following section (68) provisional sentence cannot now be granted on a copy of a bill of exchange or promissory note. But this Act applied only to bills of exchange and promissory notes, and not to any other kind of liquid document, as to which the old law is still in force. But protest may be made on a copy of a lost or destroyed bill.[1]

The Supreme Court has refused to grant provisional sentence against a person who had signed a bill by crosses thus, X X X, and even refused to receive parole evidence that these crosses were made by him.[2] It may be considered presumption on my part to dissent from a judgment of the Supreme Court, but I question whether this decision did not construe the rule too strictly. In the summons the defendant is called upon to deny his signature. He chooses, either purposely (and this is frequently done to avoid imitation), or because he cannot write, to make certain marks or signs or a few dashes of the pen, which shall represent his signature, or at any rate his acknowledgment of the debt. If he does not appear to deny and disprove the alleged signature, then those marks or signs, if there is *primâ facie* nothing to the contrary, should as much be taken to be genuine and to represent the defendant's signature as that of a wholly illegible signature, of which there are a good many. The word "*subscribere*," whatever may have been its original meaning among the ancient Romans, has since been accepted in the sense that a person need not literally "underwrite" or "subscribe" his name, because there never was any compulsion for a person to write legibly; he may write the best way he can, or make any mark or sign that he pleases which shall represent his signature. This mark or sign is usually by crosses, though any others may be made; and the making of a cross (X) has its origin from the teachings of the ancient Church, that if a mark or sign has to be made it should be the sign of the cross. But provisional sentence has of recent years been given in the Supreme Court on notes signed in Arabic or Hindostani, the alleged signatures to which looked more like

[1] § 49 (7).

[2] *Carstens* vs. *Hendricks*, 1 M., 64.

the scrawls of a little child first attempting to write than that of an Arabian or Indian merchant.

From the examples above given for and against the demands for provisional claim it will be seen that while our *Courts adhere strictly to the principles of the Dutch law, that liquid proof, in writing, of a debt due is required to obtain provisional sentence, the party who wishes to oppose the sentence must satisfy the Court, no matter what the nature of his proof or evidence may be (whether documentary or otherwise, and whether upon facts or points of law), that* primâ facie *his allegations, if proved in the principal case, and if they cannot be answered or satisfactorily explained by the plaintiff, will ensure his success at the trial.*[1]

In the case of *Simson & Co.* vs. *Fleck*,[2] it is stated that when the plaintiff has withdrawn a provisional summons he cannot proceed *de novo* until the costs of the former summons have been paid, and this payment should be made before any fresh proceedings are initiated. But the Supreme Court held that this case is wrongly reported,[3] and that on reference to the original record it was found that there was a special order as to costs which the report does not say.[4] So too if provisional sentence has been refused with costs, the plaintiff is unable to proceed with the principal case until defendant's costs are paid; nor can the defendant proceed with the principal case, when provisional sentence has been granted against him with costs, until he shall have paid the plaintiff's costs.

As a general rule there is no appeal from a provisional sentence, nor indeed is there against any interlocutory sentence, except only when the consequence is one of infamy and otherwise irreparable.[5]

It is singular that, though special rules have been made fixing the provisional days during vacation, there is no rule fixing those days in term, and yet that Thursdays, in term,

[1] *Raubenheimer* vs. *Campher*, B. for 1874, p. 7; *Piton* vs. *Exors. of Beyers*, B. for 1876, p. 128; *Watson* vs. *Solomon*, Ibid, p. 158; *Trustees Stellenbosch Bank* vs. *Myburgh*, Ibid, p. 206.

[2] 2 M., 255.

[3] See *Marincowitz* vs. *Mathys*, 5 C. T., 299.

[4] See Chapter "*Costs*."

[5] G.P.B., Vol. 2, p. 767, § 3; Lybrecht, Vol. 2, Chap. 42, § 3; Kersteman, Chap. 22, p. 338; Schorer's Notes to Grotius, Vol. 2, p. 461.

should be observed as provisional sentence days. No trace can be found at the Supreme Court office from what date Thursdays were set apart for provisional days, in term. All we know is that it has been the practice of the Court for a very long time past. Probably (and I account for it in this way, because of so many other unpublished orders in the olden days) the Court intimated, without publishing a rule, that for Thursdays only, in term time, must provisional cases be set down; of course the Court can on the return day of the summons, and it frequently does, appoint a special day to go into a contested provisional case.[1]

The provisional days, as fixed during vacation, are in the Supreme and E. D. Courts the 12th of every month in which no term begins or ends.[2] In the High Court in Griqualand West the provisional days are January 15, April 15, July 15, and October 15.[3] The terms are fixed for the Supreme Court by the 265th, for the E. D. Court by the 1st, and for the High Court of Griqualand by the 381st Rules of Court.

A provisional sentence becomes, as already stated, *ipso facto* final by a confession of judgment; it becomes final also, and no proceedings can be taken to upset it, if within one month after the levy made under the writ of execution, or if within one month after having satisfied the judgment without the issue of a writ, the defendant does not enter appearance to answer the action, and the security given by the plaintiff in such a case becomes *ipso facto* void.[4] This Rule applies to the three higher Courts, but not to the Circuit Courts. As to the latter Courts, a provisional sentence becomes final at the expiration of one year after the execution thereof, unless within that period proceedings be taken by the defendant for the reversal or alteration of it.[5] But suppose that no payment is made by the defendant, and no writ issued by the plaintiff, by virtue of the judgments of any of the Courts named, when does a provisional sentence become final? For the three higher Courts there is no provision made, nor is there any by the law of Holland except the usual

[1] *Louw* vs. *Harris and Freeman*, B. for 1876, p. 143.
[2] Rules 253 and 272.
[3] Rule 385.
[4] Rule of Court 329*b*.
[5] Rule 179.

prescriptive period of a third of a century. The only way, therefore, to prevent the decree remaining provisional is either to get the defendant to confess judgment, or after judgment to execute the writ and levy. But a provisional sentence obtained in a Circuit Court may, upon the summons of the plaintiff, be made final by any subsequent Circuit Court for the same district, and the security for restitution given by him be cancelled.[1]

Formerly a judgment became superannuated after the lapse of a year, and this has led some to the conclusion that the sentence thereby becomes final; but all that is hereby meant is, that no writ of execution can issue after the lapse of a year unless the sentence be first revived. Now no judgment of any of the higher Courts named becomes superannuated until after the lapse of six years.[2]

De Restituendo Bond after levy of a provisional sentence, if the defendant wants to go into the principal case.

Know all men by these presents. That I, ... A.B. . . . of . . . ., am held and firmly bound to C.D. of . . . . in the sum of £ . . . . sterling, to be paid to the said C.D. his executors, administrators, or assigns, for which payment, to be well and truly made, I bind myself, my heirs, executors, administrators, or assigns firmly by these presents under my hand this . . . . day of . . . .

Whereas on the . . . . day of . . . . E.F. . . . . of . . . . did, by sentence of the . . . . Court of . . . ., recover provisionally against the said C.D. the sum of £ . . . . sterling with interest and costs by him about his suit in that behalf expended: And whereas the Sheriff has levied by virtue of the said sentence the sum of £ . . . . sterling, and whereas the said C.D. has required security for the restitution thereof if in the principal case the said sentence shall be reversed.

Now the condition of this obligation is such that if the said sentence shall in the principal case be reversed, then the above-named E.F. shall pay to the said C.D., his heirs, executors, administrators, or assigns, the said first-mentioned sum of money, or such part thereof as the . . . . Court may adjudge, or if the said judgment or sentence should be confirmed, then this Bond shall be null and void, otherwise to be and remain in full force, virtue and effect.

Thus done, &c.

[1] Rules 180 to 184.

[2] Rule 370, which applies also to Circuit Courts, but does not apply to the Magistrates' Courts. See Chapter "*Superannuation.*"

CHAPTER V.

ON SUMMONSES IN PROVISIONAL CASES.

ALL the requisites of a summons mentioned under the Chapter of "*Summonses in General*" are applicable also to summonses in provisional cases. But, in addition thereto, summonses in provisional cases require some further particulars, which will here be briefly stated.

There is in several respects a close similarity between the subject of the previous chapter and the subject of this; the two should, therefore, be studied and compared together, to thoroughly understand both and to appreciate their differences.

It is in the very essence of a summons in a provisional case that the defendant should be called upon to *acknowledge or deny* his signature to the document sued upon;[1] and if he has signed by his cross (thus X), or by any other mark or sign (as, for instance, √, or ◎, or ~~~~~~~~), he should be called upon also to acknowledge or deny his cross, mark, or sign to the document sued on; and if he fails to appear, the signature, cross, mark, or sign will be held to be tacitly acknowledged by him as genuine. And if another person has signed for him he should be called upon to acknowledge or deny that party's signature, his authority to sign for him, and his qualification.

The defendant should be called upon also *to plead* to the provisional claim of the plaintiff, and to *join issue* thereon; and also to plead to *the validity* of the debt sued upon.[2]

If an executor is summoned he should be called upon also to acknowledge or deny the signature of the deceased to

[1] *Villiers* vs. *Adendorff*, 1 M., 123.
[2] Sande 1, 8, 1; and Rule of Court 12.

the document sued on;[1] and if the signature be denied it may be proved by comparing the writings of the deceased with the signature, or by parties who either saw the deceased write his signature or who heard him acknowledge such a debt or obligation.[2]

When a summons is issued on an authenticated copy document,[3] the defendant must be called upon to acknowledge or deny the correctness of the copy sued on, and that he signed the original.[4]

If a person sues in his representative capacity, though in a provisional case, he must prove the capacity or qualification in which he sues.[5] For instance, if he sues as executor he should prove his executorship by his letters of administration; if he sues the defendant in his capacity as executor, he should prove it by the defendant's letters of administration or a certificate thereof by the Master; if the trustee of an insolvent estate sues or is sued, his capacity must be proved by his certificate of appointment; and so, in each case, every person's capacity must be proved by the best evidence at hand.

A power to sue should be signed by all the trustees, and even if one signs for "self and co-trustee" without special authority, it is insufficient to support a summons in a provisional case.[6] The same rule applies to executors, and of course also whether they or the trustees are defendants. Nor can provisional summons be issued against an executor who merely signed a note q.q. without specifying the estate.[7]

The omission of the word "*provisional*" before the word "claim" in a summons in a provisional case is fatal to the summons; for instance, if one merely calls upon the defendant to "plead to his claim," instead of saying to the "*provisional claim*," of the plaintiff, the summons is void *ab initio*.[8]

The summons should sufficiently describe the document sued upon, so that there can be no mistake or doubt as to which one is meant; for instance, the nature or title of the

[1] Sande 1, 8, 1; and Grotius 3, 5, 5.
[2] Wassenaar, 1, 6, 13.
[3] See Chapter "*Provisional Sentence*."
[4] Merula 4, 66, 4, §§ 2, 3, 4, and notes.
[5] Sande 1, 8, 2.
[6] *Trustees of Dodds, King & Co.* vs. *Watson*, 1 M., 140.
[7] *Eldridge* vs. *Wicht*, B. 1870, p. 6.
[8] *Horst* vs. *De Villiers*, 1 M., 126.

document should be stated, whether it is an "acknowledgment of debt," or "promissory note," or an "undertaking to pay," or an "I.O.U.," or "cheques," or "bills of exchange," or a "lease," or a "bond," or "conditions of sale," or whatever else it may be; the date should also be given, and the amount; by whom signed, and in whose favour; and if there are endorsers or cessionaries through whom the plaintiff acquired his title, their names should also be stated, and the summons should aver the endorsements or cessions.[1]

In a note made payable to "A" or bearer no endorsation is necessary to vest the right in the note in the plaintiff.[2]

A provisional summons has been held defective on account of an insufficient description of the judgment of an *inferior Court* on which provisional sentence was claimed, in that it did not state the district of the Court that had given the sentence.[3]

A provisional summons must contain the date of its issue, and the day, hour, and place for the defendant's appearance;[4] and it may be issued at any time in or out of term, but can be made returnable only on a day set apart for provisional sentence.[5]

A true copy of every document sued upon in a provisional case should accompany the summons, and be served on the defendant at the same time with the summons, and the Sheriff should make a return to that effect.[6] Any material variance between the original and the copy served is fatal to the summons and bad service, and summons must be issued *de novo.*

As to what constitutes a *material variance* must depend upon the nature of each case. For instance, the omission from the copy served on defendant of an intermediate cession, though erased by cross lines, was considered a material variance from the original;[7] and where the defendant was described in the summons as "M. de Kock, *Joseph* son," while the copy bond upon which he was sued described him as

[1] *Wolhuter* vs. *Van Hellings*, *Hovil and Matthews* vs. *Saunders and Johnstone*, *Sturgis* vs. *Morris*, *Moore* vs. *Alexander*, 1 M., 116, 121, 122.

[2] *Brink* vs. *Napier*, 1 M., 119.

[3] *Malan* vs. *Theron*, 1 M., 123.

[4] Rules 12, 170, 329.

[5] Rules 10, 12, 272.

[6] *Wolhuter* vs. *Hellings*, 1 M., 116.

[7] *Serrurier* vs. *Executor of Cautz*, 1 S., 106.

"*Josias* son," the Court held the variance fatal to the summons;[1] again, provisional sentence was refused, on the ground of fatal variance, on a summons which described the note sued on as being dated the 11*th* April, whereas it was dated the 12*th* April;[2] so also where the copy of the note served on the defendant gave the amount of the note in these words, "the sum of and ten pounds," &c., whereas the note was for £110, &c., and though this note was correctly described in the summons, the Court held the variance between the copy served and the original note material, and sufficient to refuse provisional sentence upon.[3]

On the other hand, where the defendant's signature, "Baumgardt," to a promissory note was so written that the last two letters bore a greater resemblance to *ett* than to *dt*, though after a careful inspection it could be read as *dt*, and in the copy of the note served on the defendant the name was written "Baumgar*ett*," while in the summons the note was described as being signed by "Baum*b*gardt," the Court held the differences between the actual name and that set forth in the copy note served and mentioned in the summons as an immaterial variance, and gave provisional sentence.[4]

It is not necessary that a copy of the protest for non-payment of a bill or note should accompany and be served with the summons;[5] nor is it necessary that a copy of the certificate of registration on the bond should be served;[6] nor is it necessary to serve the record or an office copy of any judgment of the Supreme or Circuit Court which shall be required to be produced at the hearing of a case;[7] nor of any Magistrate's Court; but nevertheless a certified copy of the judgment and return to writ of a lower Court should be produced when provisional sentence is asked for in a higher Court;[8] nor is it necessary to serve on the defendant a copy of the affidavit by which it is to be proved that the notice calling up the bond had been given to him.[9]

[1] *Richter* vs. *De Kock*, 1 M., 117.
[2] *Rudd* vs. *Theron*, 1 S., 76.
[3] *Atkinson* vs. *Norden*, 1 M., 120.
[4] *Brink* vs. *Napier*, 1 M. 119.
[5] *Rens* vs. *Van der Pvel and De Roubaix*, 1 M., 118.
[6] *Borcherds* vs. *De Wet*, 1 M., 118.
[7] *A.* vs. *B.*, 1 M., 118.
[8] *De Villiers* vs. *Cruywagen*, and *Tredgold* vs. *Leeuwner*, 1 M., 28, 29.
[9] *Nederland's Executors* vs. *Gnade*, 1 M., 119.

The plaintiff having two distinct claims against the defendant, one liquid and the other illiquid, may sue the defendant on them in one summons, and on the return day of the summons pray for provisional sentence against him on the liquid claim, while he proceeds separately with the principal case on the illiquid claim in the same way as if there had been two separate and distinct summonses, one for each claim.[1] In this dual summons, while calling upon the defendant to plead to the provisional claim, &c. (the usual provisional summons), the summons should add that upon the illiquid claim the plaintiff will proceed in the usual manner provided by the Rules of Court for such cases. The object is to save the defendant the cost of two summonses, and to prevent the unnecessary splitting-up of actions.

Where two summonses on separate promissory notes had been taken out on the same day by the plaintiff against the defendant, though provisional sentence was granted on both notes, the costs of only one summons were allowed.[2]

A summons for the payment of a promissory note cannot legally be issued out of the office of the Registrar of the Court on the day on which the note became payable.[3]

Interest can be claimed in the summons from the day of payment specified in the instrument of debt sued upon, although no demand had been made, and although the instrument does not stipulate for interest;[4] but unless the document sued on stipulates what shall be the rate of interest, then only six per cent. can be claimed.[5] No compound interest can be charged in the absence of a special agreement to that effect.[6] In the Roman law this is called "*anotacismus*,"[7] and the interest must never exceed the capital.[8]

The plaintiff, in case he sues upon a mortgage bond, may in the summons call upon the defendant to shew cause why the property specially mortgaged by the bond shall not be declared executable for the sum demanded, whether it be the

[1] Merula 4, 24, 6 & 7; and 4, 37, 2, 16.
[2] *Simpson* vs. *Naudé*, 2 E.D.C., 156.
[3] *Thalwitzer* vs. *Sparmann*, 2 M., 289.
[4] *Thibart* vs. *Thibart*, 3 M., 472.
[5] *Dyason* vs. *Ruthven*, 3 S., 282.
[6] *Heineman* vs. *Barnes*, 6 C.T., 106.
[7] Code 4, 32, 28.
[8] V. D. K., 549. See also *Heydenrych* vs. *du Preez*, 7 C. T., 1.

capital or the interest, or both.[1] But, in its discretion, the Court has refused to decree execution against the landed property where the summons was for the *interest* only.[2] Of course, if the plaintiff can satisfy the Court that the defendant has not sufficient movables to meet the interest, the decree for execution against the property mortgaged will be granted.

When the landed property has been declared executable, there is nothing to prevent the writ being issued against the immovable property as well as against the goods and chattels of the defendant.[3]

In summoning a person for provisional sentence on conditions of sale and purchase of landed property, the summons should tender transfer of the property sold, and the plaintiff should tender also compliance with all the conditions of sale.[4] If the purchaser sues for transfer, he should tender the purchase-money in the summons, and compliance in other respects with the conditions of the sale on getting transfer.

It should be averred in the summons against an acceptor of a bill of exchange, or maker of a promissory note, that the bill of exchange or promissory note upon which provisional sentence is sought has been presented for payment at the place specified therein, and that it has not been paid; and as to the acceptor, the summons should aver also presentment to him, and that payment has been refused by him.[5]

So also in a provisional claim *by* an indorsee of a bill of exchange, the summons must aver the endorsement;[6] but it is not necessary in a provisional claim *against* the indorsers of a bill of exchange to aver in the summons that the bill had been presented for payment to the acceptor, and that payment had been refused;[7] nor is it necessary to allege in such summons, on a document payable in instalments, that the defendant had made default in the payment of the monthly instalments.[8]

The summons on a bond payable at three months' notice

[1] Jud. Prak., 2, 6, 5, and Merula 4, 37, 2, 3.

[2] *Mutual Life Assurance Society* vs. *Niekerk*, 3 J., 318.

[3] See Chapter "*Writs*."

[4] *Fouchee* vs. *Van Ellewee*, 1 M., 18.

[5] *Simpson Brothers & Co.* vs. *Allingham*, and *Norton* vs. *Speck and another*, 1 M., 62 and 65; and *Vervey* vs. *Hanah Brothers and Dell*, 2 S., 270.

[6] *Moore* vs. *Alexander*, 1 M., 122.

[7] *Rens* vs. *Van der Poel and another*, 1 M., 122.

[8] *Muller* vs. *De Kock*, 1 M., 125.

should state that the bond has become due and payable after being duly called up by a previous three months' notice; but when the bond contains a clause that on non-payment of the interest it shall be due and payable at once, it is not necessary to give notice, nor is it necessary to state in the summons, though it is most frequently done in practice, that the bond has become due and payable by reason of the non-payment of the interest.[1] If, however, the notice to pay up the bond has been given by the mortgagor to the mortgagee, and he fails to pay at the expiry of the notice, then the mortgagee can sue provisionally for the amount of the bond and interest without giving notice calling in the bond;[2] and where an executor has given notice to creditors to lodge their claims, and the mortgagee has done so, the latter can issue summons for provisional sentence on his bond without giving the notice required by the bond.[3]

No claim should be made in a summons for provisional sentence for the *penal stipulation* contained in a note, bond, or other document sued on; and if any such claim shall be made it will be surplusage, and regarded as not inserted; but the rest of the summons, if good, will stand.

There is nothing, however, to prevent the plaintiff from suing the defendant, and it has sometimes been done, by way of an illiquid claim, for the penal stipulation, and the Court of Appeal has confirmed a judgment of the Circuit Court of Oudtshoorn for £20 damages and costs in an action for the recovery of the 5 per cent. penal stipulation in a note not paid on the due date.[4]

If, for whatever reason, a case should be thrown out on the summons, with costs, and it becomes necessary to summon again, no fresh summons can be issued without the costs of the previous summons, and all the proceedings thereon, being first paid.

No pleadings are, as a rule, filed on a provisional summons. On the return day of the summons judgment is prayed for in

[1] *Faure* vs. *Wright*, 1 M., 21; *Muller* vs. *De Kock*, 1 M., 125; and *Hossack* vs. *Haasbroek*, 2 J., 285.

[2] *Krynauw* vs. *Gildenhuysen*, 1 M., 20.

[3] *Southey* vs. *Borcherds*, *Executor of Dormehl*, 1 M., 22.

[4] *Gavin* vs. *Nel and De Jager*, decided July, 1886, not reported.

terms thereof. If the defendant denies the debt or his further liability, the denial is usually made on affidavit, but with permission of the Court it may also be made *vivâ voce* on oath; if he denies his signature, the denial may also be made by affidavit, but more usually it is made *instanter*, by calling witnesses to prove or disprove the signature. Sometimes, after a couple of affidavits have been exchanged between the parties as to the denial of signature, it is found more convenient to call witnesses; or the Court may, after hearing some affidavits, order that witnesses shall be called, either then or at some future date to be fixed by the Court. The plaintiff must first produce some evidence as to the genuineness of the signature, after which the defendant produces rebutting evidence.[1] Whenever witnesses are called the Court will dispose of the case without ordering pleadings to be filed. When the case is heard only on affidavits, the Court may, in its discretion, dispose of it or not on the affidavits, or order pleading to be filed, according to the importance of the case and the principal case to be gone into.

But whether provisional sentence has been refused or granted, the disappointed party can always go into the principal case, provided the refusal of the sentence is not owing to a bad or defective summons;[2] and the summons used in the provisional case will, if good, stand as the summons for the principal case; and the proceedings may take place as if provisional sentence had never been claimed.[3] So also in the case where a notice of motion has been served, if the Court order the parties to try by action the matters in dispute the notice will stand in lieu of a summons.

A summons in a provisional case can be made returnable only on a day set apart for provisional sentence.[4]

The District Registrars have no authority to issue a summons for *provisional* sentence returnable in the Supreme Court under Rule of Court 327. Their jurisdiction is confined to *Illiquid* Summonses.[5]

[1] See Chapter "*Provisional Sentence.*"

[2] Hol. Con., Vol. 2, Con. 137.

[3] Prefatory Remarks to 1 M., § 8, and a great many cases since, which need not be quoted.

[4] What days these are, see Chapter "*Provisional Sentence.*"

[5] *Woodhead Plant & Co.* vs. *Pietersen & Co.*, 6 C. T., 497.

The *induciæ* of a summons in a provisional case are regulated, in the Supreme Court, by the 328th and 377th Rules of Court; in the E. D. Court by the 249th Rule; in the High Court of Griqualand by the 328th Rule as amended by the 343rd.

From the foregoing remarks it will be observed that the essential requisites of a summons in a provisional case, and which are not necessary in a summons in an illiquid case, are:—

(1) The defendant must be called upon to acknowledge or deny his signature, mark, or sign, or the signature of the deceased in case he is sued as executor; or the signature of the person who is alleged to have signed the document for him, his qualification, and the authority to sign.

(2) He must likewise be called upon to plead to the provisional claim of the plaintiff, and to join issue thereon; also to plead to the validity of the debt.

(3) The summons must contain a full and accurate description of the document sued upon.

(4) A true copy of the document sued on must be attached to and served with the summons, and there must be no material variance between the copy served and the original.

(5) It should aver the endorsements or cessions through which plaintiff acquires his title.

(6) When a document is made payable at any particular place it should be so stated in the summons, and that it had been presented there and payment refused.

Summons for provisional sentence on a mortgage bond.

Edward the Seventh, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India. To the Sheriff of the Colony of the Cape of Good Hope or his lawful Deputy—greeting:

Command . . . . of . . . . hereafter called the defendant, that justly and without delay he render and pay to . . . . of . . . . , hereinafter called the plaintiff, the sum of . . . . which he owes to and unjustly detains from the said plaintiff upon and by virtue of certain mortgage bond, bearing date the . . . . day of . . . ., passed by . . . . as the duly authorized agent of the said defendant, together with the interest thereon reckoned at the rate of . . . . per cent. per annum, from the . . . . day of . . . ., which

said bond has become due and payable in consequence of (if by reason of *non-payment of interest*, then say so: and if by reason of having been called up, after three months' notice, then omit the words "in consequence of," and after the word "payable," put "*after three months' notice having been duly given, calling up said bond, in terms thereof,*"; or if for any other reason, then state it, as, for instance, where the defendant himself has given notice that he would pay the bond after three months, then after the word "payable," say, "*by reason of the defendant having given three months' notice in terms of the said bond that he would pay the same*"); as it is said; and unless he shall do so, then summon the said defendant that he appear before our Justices of our Supreme Court of our said Colony, at Cape Town, on the . . . . day of . . . . at 10 o'clock in the forenoon, to shew wherefore he hath not done it; and also to acknowledge or deny the signature (of . . . .) affixed to the said bond or his qualification, or the validity of the said debt.

And also summon the said defendant, then and there to plead to the provisional claim of the said plaintiff, for payment thereof, made under security, with costs: and at the same time to show cause, if any, why the property specially mortgaged by the said bond shall not be declared executable for the sum above demanded; to join issue thereon. And serve on the said defendant a copy of this summons, and of the said bond whereon the said provisional claim is founded; and return you then there this summons with whatsoever you have done thereupon.

Witness: The Right Honourable Sir J. Henry de Villiers, K.C.M.G., our Chief Justice of the said Colony, at Cape Town, the . . . . day of . . . . in the . . . . Year of our Reign.

. . . . . .
Registrar of the Supreme Court.

C. H. Van Zyl,
Plaintiff's Attorney,
Cape Town.

Summons for provisional sentence on a promissory note.

(Heading.)

To the Sheriff, &c., greeting. Command A.B. of . . . ., hereinafter called the defendant, that justly and without delay he render to C.D. of . . . ., hereinafter called the plaintiff, the sum of £ . . . . sterling, which he owes to, and unjustly detains from, him, upon and by virtue of a certain promissory note bearing date the . . . . day of . . . . and payable at . . . ., made and signed by the said A.B. (if the promissory note is signed by a cross, then add here the words after A.B. "*by his mark, sign, or cross*") to and in favour of E.F., or order, and endorsed in blank by the latter, and by G.H., together with the interest thereon from the . . . . day of . . . . The said promissory note having, at maturity, been duly presented at . . . ., where the same is made payable, but payment thereof refused for want of funds, and due notice of its dishonour given to the endorser thereof.

As it is said; and unless he shall do so, then summon the said defendant, that he appear before our Justices of our Supreme Court of our said Colony, at Cape Town, on the . . . . day of . . . . at ten o'clock in the forenoon, to shew wherefore he hath not done it, and also to acknowledge or deny his signature (if signed by cross, then add here the words "or *mark*, *sign*, or *cross*") affixed to the said promissory note, or the validity of the said debt.

And also summon the said defendant then and there to plead to the provisional claim of the said plaintiff, for payment thereof, under security; with costs; and to join issue thereon. And serve on the said defendant a copy of this summons, and of the said promissory note, whereon the said provisional claim is founded; and return you then there this summons with whatsoever you have done thereupon.

Witness, &c.

NOTE.—*A summons on a bill of exchange, or cheque, or I.O.U., or other written acknowledgment of debt, other than those for which forms are here given, is to be in the same form as this summons, changing only the description of the name of the liquid document sued on.*

Summons for provisional sentence on conditions of sale of a farm.

(Heading.)

Command A.B., C.D., and E.F., all of . . . ., hereinafter called the defendants, that justly and without delay, the one paying, the other or others to be absolved, they render and pay to G.H. of . . . . hereinafter called the plaintiff, the sum of £ . . . . sterling which they owe to and unjustly detain from him, upon and by virtue of certain Conditions of Sale and purchase of the farm . . . . situate in the district of . . . . bearing date the . . . . day of . . . ., purchased by the said defendant A.B. from the said plaintiff, at a public auction held on that day; and by which said conditions the said defendants C.D. and E.F. interposed and bound themselves as sureties under the renunciation of the benefits of the legal exceptions *ordinis seu excussionis et divisionis.* The said plaintiff hereby offers and tenders transfer of the said farm upon the purchase amount being paid.

As it is said; (here conclude as in the rest of a summons in a provisional sentence case).

Summons for provisional sentence on a mortgage bond duly ceded.

(Heading.)

Command A.B. of . . . ., hereinafter called the defendant, that justly and without delay he render and pay to C.D. of . . . ., hereinafter called the plaintiff, the sum of . . . . which he owes to and unjustly detains from the said plaintiff, upon and by virtue of certain mortgage bond, bearing date the . . . . day of . . . . passed by . . . . as the duly authorised agent of the said defendant, to and in favour of E.F., together with the interest thereon at . . . . per cent. per annum from the . . . . day of . . . ., which said

bond was on the . . . . day of . . . . duly ceded by the said E.F. to the said C.D., who is now the legal holder thereof: which said bond has become due and payable in consequence of . . . . (state why): as it is said;—and unless he shall do so, then summon the said defendant that he appear before our Justices of our Supreme Court of our said Colony, at Cape Town, on the . . . . day of . . . . at 10 o'clock in the forenoon, to shew wherefore he hath not done it; and also to acknowledge or deny the signature (of . . . .) affixed to the said bond, or his qualification, or the validity of the said debt.

And also summon the said defendant, then and there to plead to the provisional claim of the said plaintiff, for payment thereof under security: with costs:—and at the same time to show cause, if any, why the property specially mortgaged by the said bond shall not be declared executable for the sum above demanded; to join issue thereon.

And serve on the said defendant a copy of this summons, and of the said bond *and of the said cession* whereon the said provisional claim is founded; and return you then there this summons with whatsoever you have done thereupon.

Witness, &c.

Summons, partly for provisional sentence and partly for an illiquid claim.

(Heading.)

Command A.B. of . . . ., hereinafter called the defendant, that justly and without delay he render to C.D. of . . . ., hereinafter called the plaintiff; 1st, the sum of £ . . . . sterling which he owes to and unjustly detains from him, upon and by virtue of a certain promissory note, bearing date the . . . . day of . . . ., made and signed by the said A.B. to and in favour of the said C.D., who is the legal holder thereof, together with the interest thereon from the . . . . day of . . . .; as it is said; and unless he shall do so, then summon the said defendant, that he appear before our Justices of our Supreme Court of our said Colony, at Cape Town, on the . . . . day of . . . ., at ten o'clock in the forenoon, to shew wherefore he hath not done it, and also to acknowledge or deny his signature affixed to the said promissory note or the validity of the said debt.

And also summon the said defendant, then and there to plead to the provisional claim of the said plaintiff for payment thereof, under security; with costs; and to join issue thereon. And serve on the said defendant a copy of this summons and of the said promissory note, whereon the said provisional claim is founded.

2ndly. That within . . . . days after the service of this summons, the defendant cause an appearance to be entered in our said Court, to answer the said plaintiff who claims the sum of £ . . . . sterling for damages sustained by reason that the defendant did on the . . . . day of . . . . wrongfully and unlawfully cut down certain (. . . .) fir trees in the avenue . . . . at . . . . between the properties of the said plaintiff and the said

defendant: and to go into the principal case with regard to this count in this summons.

And return you then there this summons with whatsoever you have done thereupon.

Witness, &c.

Summons for provisional sentence in the Supreme Court on an unsatisfied judgment of the Magistrate's Court, and for the purpose of attaching landed property.

(Heading.)

Command A.B. . . . . of . . . . that justly and without delay he render and pay to C.D. of . . . .

1st. The sum of £ . . . . sterling of lawful money which he owes to him upon and by virtue of a certain judgment of the Resident Magistrate's Court of . . . . bearing date the . . . . day of . . . . obtained by the said C.D., in a cause wherein he was the plaintiff, against the said A.B., who was the defendant, being the amount of a certain (here state cause of debt) promissory note dated the . . . . day of . . . . together with the interest thereon from the . . . . day of . . . . at the rate of . . . . per cent. per annum; for which said judgment a writ of execution was issued out of the office of the said Magistrate, directed against the goods and chattels of the said defendant, but a return of *nulla bona* was made thereon by the messenger of the said Court.

2ndly. The sum of £ . . . . sterling, being the taxed costs and charges incurred by the said C.D. in and about obtaining the said judgment and of the execution of the writ aforesaid.

3rdly. To shew cause why certain erven of the said defendant (here describe the landed property) situate in the village of . . . ., more fully described in a deed of transfer thereof to him bearing date the . . . . day of . . . . shall not be declared executable and be attached to satisfy the said judgment and writ, and the costs of these present proceedings.

As it is said;—and unless he shall do so, then summon the said defendant, that he appear before our Justices of our Supreme Court of our said Colony, at Cape Town, on the . . . . day of . . . . at ten o'clock in the forenoon, to shew wherefore he hath not done it, and also to acknowledge or deny the validity of the said judgment.

And also summon the said defendant then and there to plead to the provisional claim of the said plaintiff for payment thereof, under security; with costs; and to join issue thereon. And serve on the said defendant a copy of this summons, of the said judgment, writ and return thereon, whereon the said provisional claim is founded; and return you then there this summons with whatsoever you have done thereupon.

Witness, &c.

Summons for provisional sentence partly on a mortgage bond and partly for the interest thereon recovered in a Magistrate's Court with costs.

(Heading.)

Command A.B. of . . . ., hereinafter called the defendant, that justly and without delay he render and pay to C.D. of . . . ., hereinafter called the plaintiff,

1st. The sum of . . . . which he owes to and unjustly detains from the said plaintiff, upon and by virtue of certain mortgage bond, bearing date the . . . . day of . . . . passed by . . . . as the duly authorized agent of the said defendant, together with the interest thereon, reckoned at the rate of . . . . per cent. per annum from the . . . . day of . . . ., which said bond has become due and payable in consequence of (here state the reason).

2nd. The sum of £ . . . . sterling, being . . . . months' interest due on the said bond from the . . . . day of . . . . to the . . . . day of . . . ., and for which the said plaintiff obtained judgment against the said defendant, on the . . . . day of . . . . in the Resident Magistrate's Court of . . . ., and for which said judgment a writ of execution was issued on the . . . . day of . . . ., and a return of *nulla bona* made thereon.

3rd. The sum of £ . . . . sterling being the taxed costs of the said plaintiff, in and obtaining the said judgment.

As it is said;—and unless he shall do so, then summon the said defendant, that he appear before our Justices of our Supreme Court of our said Colony, at Cape Town, on the . . . . day of . . . . at ten o'clock in the forenoon, to shew wherefore he hath not done it; and also to acknowledge or deny the signature (of . . . .) affixed to the said bond, or his qualification, or the validity of the said debt.

And also summon the said defendant, then and there to plead to the provisional claim of the said plaintiff, for payment thereof under security; with costs; and at the same time to show cause, if any, why the property specially mortgaged by the said bond shall not be declared executable for the sums above demanded, to join issue thereon. And serve on the said defendant a copy of this summons, and of the said bond and of the said judgment and writ of execution, and return thereon, whereon the said provisional claim is founded; and return you then there this summons with whatsoever you have done thereupon.

Witness, &c.

Summons for provisional sentence against one's client on a bill of costs.

(Heading.)

Command A.B. of . . . . that justly and without delay he render and pay to C.D. of . . . ., attorney-at-law, the sum of £ . . . . sterling of lawful money which he owes to and unjustly detains from him, being the amount of a certain taxed bill of costs, and charges of the said plaintiff for the work and labour by him done and performed, and professional services rendered, and the care, diligence, and attendance by him bestowed as the attorney of and for the said defendant, and at his special instance

and request; and for fees and disbursements due and of right payable in respect thereof in and about a certain suit for (here state cause of action) and wherein the said A.B. was (plaintiff or defendant) and one E.F. was (plaintiff or defendant), and which said action (here state what became of it, so as to shew your client's liability, for instance) was withdrawn by the said A.B., and he thus became liable for the costs incurred therein.

As it is said;—and unless he shall do so, then summon the said defendant that he appear before our Justices of our Supreme Court of our said Colony, at Cape Town, on the .... day of .... at ten o'clock in the forenoon, to shew wherefore he hath not done it: and also to acknowledge or deny his signature affixed to the power of attorney, to sue (or defend) in the said action: or the qualifications of the said plaintiff, or the validity of the said debt.

And also summon the said defendant, then and there to plead to the provisional claim of the said plaintiff, for payment thereof, under security; with costs; and to join issue thereon. And serve on the said defendant a copy of this summons, and of the said bill of costs, and power to sue (or defend) whereon the said provisional claim is founded; and return you then there this summons with whatsoever you have done thereupon.

Witness, &c.

Summons for provisional sentence on an Edictal Citation.

Citation by Edict.

(See page 125.)

To T.I.F., of ....

That whereas E.E., formerly G. (born P.), of Elands Post, in the Division of Stockenstrom, has, on the second day of August, 1878, petitioned the Honourable the Supreme Court for leave to sue by edict T.I.F., now or lately of the Division of Stockenstrom, for payment of a certain mortgage bond, for the sum of one hundred and seventy-four pounds sterling, passed in her favour on the first day of September, 1868, by W.E.M., as the duly authorized agent of the said T.I.F., and one P.G.F., the latter of whom has since become insolvent, together with the interest on said bond, from the said first day of September, 1868, at the rate of ten per cent. per annum.

Now this Court having taken the prayer of the said E.E. into consideration, and having granted the same accordingly, by these presents doth summon the said T.I.F., now or lately of the Division of Stockenstrom, to appear before the Supreme Court, at Cape Town, on the twelfth day of September, 1878, at ten o'clock in the forenoon precisely, either in person or by proxy, to show cause why he hath not paid to the said E.E. the said sum of one hundred and seventy-four pounds, due upon and by virtue of the said bond, together with the interest due

thereon as aforesaid : and also to acknowledge or deny the signature of the said W.E.M., affixed to the said bond, or his qualification, or the validity of the said debt; and also summon the said T.I.F., then and there to plead to the provisional claim of the said E.E., for payment thereof, under security with costs ; and at the same time to shew cause, if any, why the property specially mortgaged by the said bond shall not be declared executable for the sum above demanded, and to join issue thereon.

Thus done and granted in the Supreme Court, at Cape Town, Cape of Good Hope, on the second day of August, 1878, in the forty-second year of our reign.

J. C. B. S . . . . . .
Registrar of the Supreme Court.

. . . . . , Plaintiff's Attorney,
De Lettre Chambers, Church Square, Cape Town.

Summons for provisional sentence in a Circuit Court.

In the Circuit Court for the District of . . . .

(Heading.)

Command A.B. of (here proceed with claim and describe the document as in a Supreme Court summons).

As it is said ; and unless he shall do so, then summon the said A.B. that he appear before our Judge of our Circuit Court for the District of . . . . of our said Colony of the Cape of Good Hope, to be holden at . . . . on the first day of the sitting of the said Court, at nine o'clock in the forenoon, to shew wherefore he hath not done it; and also to acknowledge or deny . . . . signature affixed to the said . . . . or the validity of the said debt.

And also summon the said A.B. (here follow and conclude as in a Supreme Court summons for provisional sentence).

Witness : The Honourable . . . . one of the Judges of the Supreme Court of our said Colony, at . . . . the . . . . day of . . . . in the . . . . year of our reign.

. . . . . .
Plaintiff's Attorney.

. . . . . .
Clerk of the Resident Magistrate.

Notice to accompany preceding summons.

Take notice that you are at liberty, either personally or by your attorney or agent, at any time not later than three days before the day specified in the annexed summons for your appearance before the Circuit Court, to enter your appearance with the Clerk of the Resident Magistrate for the District of such Court ; and thereupon to confess or deny the claim or demand of the said plaintiff, and that you may then make and state to the said clerk any claim which you have against the said plaintiff ;

and that, if you shall then confess to the said clerk the whole claim or demand of the said plaintiff, and shall not make any counter-claim against him, it will not be necessary for you to appear before the Circuit Court, either personally or by your attorney or agent, and final judgment will be given against you by the said Court, according to such your confession.

Dated at . . . . this . . . . day of . . . .

. . . . . .
Plaintiff's Attorney.

To
A.B.
of . . . .
the above defendant.

CHAPTER VI.

EDICTAL CITATIONS.

IN the Chapter on Summonses I foreshadowed this subject. The two should be studied together. The rule of law is "*actor sequitur forum rei*," but in an edictal citation, where such a citation can be issued, we have the exception. In the Chapter on Summonses the mode of service was given. The same principle will apply to this subject, where a personal service can be effected, but when it cannot be done the instructions of the Court must be followed.

An edict (meaning a command, an order, or a rule of action) could in ancient days be issued only by a Sovereign or Ruler, though in later times it could be issued also by a competent tribunal or Court within its jurisdiction.

If issued by a Prince, or Ruler, it might either be as a temporary legislative act or as a permanent law. But now that the power of making laws is no longer lodged in the Sovereign, but in Parliament, edicts for legislative purposes cannot as a rule be issued in countries having a Parliament.

An edictal citation, however, is peculiarly applicable only to a Court of law, in whose name such an order or command is issued.

A writer in the seventeenth century (Nicolay, I think) says that the "Edictal Citation" is derived from human as well as from divine law, and cites in support of the latter, Genesis iii. 9, "And the Lord God *called* unto Adam, and said unto him, *Where* art thou?" It is impossible to trace the subject so far back with any degree of accuracy; and it is therefore sufficient for my purpose to start from a much later period. Nicolay's work, I may remark, is on criminal procedure,

but in those days in Holland persons could be edictally sued, and tried in their absence, in criminal matters also.

In Rome, under the Republic, there were formularies established for every case, so that no one could make a blunder as to the sort of action he should bring for any evil, or inconvenience, or vexation, or injury;[1] and whenever the civil law was either silent, or its rigour was unsuited to the times, the Prætor, by virtue of his legislative powers, would issue an edict to meet such a case, or would by a strained interpretation give equitable relief. This power was more particularly so exercised in cases affecting foreigners or in cases between citizens and foreigners, by the Prætor Peregrinus, by virtue of the *jus edicendi*, who, while anxious to maintain the civil law as far as he could, considered also the gradual influx of foreigners and the laws applicable to the same subject in their country; and, in order to maintain a good feeling with them, owing to commercial relations, he established by his equitable decisions a series of laws, which afterwards took the nature of a kind of international law.

In this way, then, it happened that when a foreigner had transacted business with a citizen and left without settling his affairs, the goods that he might have left behind were arrested, and he was summoned in the ordinary way to hear judgment pronounced, and to answer why the goods should not be taken into execution. If the summons could not be served, the Prætor would issue his edict; but in what form, or whether instructions were given as to service, I have been unable to trace. Probably, and this is only conjecture, it was a proclamation in the ordinary way, as edicts or proclamations were then promulgated. In course of time custom seems to have determined—for there is no edict on the subject—that even when the defendant had left no goods, he could be sued by edict. What was then first proclaimed as regards debts only, and between citizens and foreigners, was by custom and practice extended to all kinds of actions, and between citizens also, when any one of them should leave the country.

[1] Cicero, pro Roscius, 58.

Further than this I cannot carry the Roman practice, and must leave it to other hands to do. I can find no book, or set of books, treating of the subject fully; but I have gathered this much from a careful consideration of all the historical surroundings of the Prætorian edicts, and from the speeches of Cicero, especially those against Verres, and his speech for Roscius, the comic actor. Indeed, I have derived more information on points of Roman practice from Cicero's speeches than from any other source. Cicero practised both as an advocate and as an attorney, and though it may be said that the points of practice he indicated in his speeches are those of a lawyer for his client, yet I take his opinions, in the absence of proof to the contrary, as being correct.

Coming next to Holland, we must assume that in taking over the Roman law, its practice was also adopted, but there is a long interval between the Prætorian Edictal Period of Rome, in the third century before Christ and the sixteenth century after Christ, when we get the first trace of the subject in the Dutch law-books. It is clear, however, that the practice was in force in Holland before any statutory enactment was passed there upon it, and these enactments have reference only to service and to defaults, and to the "Door-keeper's (Deurwaarder) duty (for which in our reading we should substitute the sheriff)—points on which the Roman-Dutch practice is silent. They are the following Placaaten: 10th August, 1531, § 98; 31st May, 1582, §§ 106, 108, 109, 110 & 252, G.P.B., Vol. 2, pp. 703, 790 & 827; 26th November, 1726, Vol. 6, p. 647; and 22nd November, 1735, Vol. 6, p. 642. There are two Placaaten of the 10th and 30th September, 1732, mentioned by some writers, but which I have been unable to find. Apart from these Placaaten, and the law as adopted from Rome, practice and custom combined with a series of decisions, not altering but giving a more liberal interpretation to the original, have made and moulded the law into what it now is.

The edictal citation was also formerly called a "Public Citation," because it had to be made public so as to be brought to the notice of everybody, and had also to be published in the public newspaper. The only public news-

paper recognised formerly in Holland, since the days of the publication of newspapers, was the *Government Gazette.* The original idea of a public or edictal citation was to find out the whereabouts of a defendant, and to give him and his agents or representatives notice of the proceedings. In times of war he might have been captured by the enemy, and retained in captivity. In times of peace he might have surreptitiously left, or maliciously abstained from letting his whereabouts be known. In any case, the object was that the proceedings against him should reach him, or in some way come to his knowledge, for it might be very injurious to him, in some cases, to deprive him of certain rights without a hearing. Therefore, in the degree of publicity to be given, two things are necessary to be observed: first, whether the defendant has absconded or is designedly by his own act out of the reach of the ordinary summons being served on him; and secondly, whether he is out of such reach by a decree of a higher power, or by no fault of his own. In the former case, the same care, caution, and publicity are not required in seeing that the citation should come to his knowledge as in the latter case.

An edictal citation is resorted to only in cases of necessity, and where it cannot be otherwise avoided; thus, so long as the defendant is in the same jurisdiction with the plaintiff, and can be duly served with a summons, he is not to be sued by edictal process. But when he cannot be so served by the ordinary summons, though he may still be within the same jurisdiction as the plaintiff, he must be sued edictally.

A person may be within the same jurisdiction as the plaintiff, and yet cannot be served with a summons, but must be sued edictally, because

(*a*) Either he lurks with the enemy, or the place is occupied by the enemy, and he cannot be approached, or it is dangerous to serve the summons on him.

(*b*) Or, he may have no fixed "domicile," wandering about from place to place; as in the case of many traders, or their servants or assistants, or even of vagrants.

(*c*) Or, there may be an infectious or epidemic disease raging, or other threatening evils, which make it highly

dangerous to approach the defendant, or impossible from other causes to see him or to approach his (perhaps) temporary abode.[1] But on all these points the Court must be satisfied that it is either highly dangerous, or next to impossible, to effect due service of a summons, before it will give an order for an edictal process.

In all other cases the order for an edictal citation will be given when the Court is satisfied from the petition that the defendant is

(*a*) Either out of the jurisdiction of the Court, and has no agent or representative to accept service of summons for him.

(*b*) Or that his whereabouts is not known.

(*c*) Or that he cannot be found.

(*d*) Or that he himself is unknown, as in the case of unknown heirs *ab intestato*, or when it is even uncertain who is to be the defendant. For instance, if any one prays for an order of Court, to be declared heir *ab intestato* and entitled to succeed to the estate of a person who has died intestate;[2] or to have a bond cancelled when, after the death of both creditor and debtor, proof cannot be given of payment so as to authorise cancellation in the Debt Registry.[3] In such cases the edict should be general, for instance, "against all those who have, or who pretend to have, any right on the estate as heirs *ab intestato*;" or against "all and every person having, or pretending to have, any right, title, or interest to or in the said bond." As regards the cancellation of bonds, the Court has of late followed a similar process.[4]

To summon by edict, a petition must be presented to the Court setting forth the cause of action, and stating the grounds why the defendant cannot be served with the ordinary or usual summons, but that the Court's aid is required. It must also be stated whether the defendant is within or without the jurisdiction of the Court. If the petitioner cannot state positively where the defendant is at the moment, he must

[1] Vroman, 3, 1, 11, and notes; Van Alphen, Vol. I., pp. 70, 206, 442, and 475; Merula, 4, 24, 16; Voet, 2, 4, 16; Loenius, 60.

[2] Jud. Prak., Vol. I., Bk. 2, Chap. 2, § 6; also his Law of Holland, Bk. 3, Pt. 1, § 9.

[3] *Executors of Swart* vs. *All and Sundry*, 2 M., 323.

[4] *Re Human*, 1 R., 284; and as to land, consult B. 1868, pp. 23 and 285, *Re Hawkins*.

state where he believes him to be, or where he was when he last heard from or of him. In short, the petitioner should set forth all the information within his knowledge, to justify the Court in granting the order for an edictal citation, and also that it may know what "directions" to give as to the service or publication of the citation; the object in view being that the proceedings against the defendant may come to his knowledge. But the Court will not allow an edictal citation to issue at the suit of a non-resident wife against a non-resident husband in respect of a marriage which was not contracted in this Colony;[1] but it will allow an edict to issue at the suit of a wife married and living in England against a husband domiciled here, and grant the divorce by reason of the husband not returning to his wife in England or receiving her here.[2] And though a marriage was contracted in this Colony, if the wife is non-resident, and there is *primâ facie* evidence that the defendant (the husband) is not only absent from the Colony, but is not domiciled here, the Court will not issue the edict until jurisdiction has been founded by virtue of an arrest of the defendant or an attachment of his property.[3] If, however, the wife is domiciled here, though not the husband, she can sue though they were married elsewhere.[4]

Formerly the process by edictal citation was most tedious, cumbersome and expensive. The proceeding was in this form—the plaintiff petitions for leave to sue by edict; he gets the order, publishes it in the *Gazette*, and on the return day asks the Court for the benefit of the first default, and for leave to issue the second citation. The second citation is then published, and on the return day thereof he asks the Court for the benefit of the second default, and for leave to issue the third citation. He does the same with the third and fourth citations, and on the return day of the latter he asks leave to file his "*intendit*," which, when done, the case is set down for trial at once, without further notice to the defendant or further publication of anything. The idea that four citations had to issue where there was no personal service, and

[1] *Whipp* vs. *Whipp*, 5 C. T., 225 and 12 S. C., 174.

[2] *Camp* vs. *Camp*, decided 1902, not reported.

[3] *Walker* vs. *Walker*, 6 C. T., 388.

[4] *Peters* vs. *Peters*, 11 C. T., 289.

that there had to be four defaults before the plaintiff could go to trial, is derived from the Dutch law, and the number of these citations in a case arose from the time of the war between Holland and Spain. It was thought that several citations should issue, and that some time should elapse between each citation, in the hope of one or other of the citations reaching the defendant. No uniform time was fixed, but the circumstances of each case had to be looked to. In a few instances in the lower Courts one citation was sufficient.[1] Our practice was the same till a few years ago. Thus I remember a case where a man sued his wife for divorce by reason of malicious desertion. The woman had deserted from Capetown to Batavia. At that time two actions were necessary, the first for restitution of conjugal rights, and the second for divorce for not obeying that decree. As the means of communication with Batavia at that time was slow and very uncertain, and only by a sailing vessel, and as the Court had to comply with the rule that "a reasonable time must be allowed for the defendant to appear here," it was found upon enquiry that six months, at least, would be required before the citation could be served in Batavia and be returned here. But as four citations had to issue in each case, with an interval of six months between each, and as on the return of the last citation of the first action it was too late to set the case down for trial that term, it could not be tried till the next term. By this time two years and three months had elapsed before the plaintiff had got his first decree. This decree had to be served on the defendant, and the date had to be fixed for her return. This took another six months. The defendant not returning by the time fixed by the Court, the plaintiff had then to begin his action for divorce by reason of the defendant's failure to return. The same process as before had to be gone through. Again four citations had to be issued, only substituting divorce for restitution of conjugal rights, with the same interval of six months between each. By the time the plaintiff got his final decree for divorce it was five years and seven months, though not a single day was lost or delayed in the proceedings. And as to the expense!—well, never

[1] Peckius, Chap. 39; Gail, 1, 53,19; Damhouder, Chap. 60.

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mind that—the lawyers got paid; but the proceedings were a fearful suspense to the plaintiff, rendered necessary by the state of the law, though there was written proof from the defendant that she would never live with her husband again.

In 1874 the procedure was simplified by the 273rd Rule of Court as to proceedings by edict; and in 1885, by the 371st Rule of Court, the double action for desertion was abolished.[1]

By the 273rd Rule of Court just quoted the plaintiff must apply for, or the Court will give, *directions* as to the—

"mode of serving the (edictal) summons . . . . and as to the time for the appearance of the defendant . . . ., and the Court shall give such directions . . . . as it shall deem proper and necessary, having due regard to the distance from this Colony of the place where the defendant is, or is believed to be, residing, and the other circumstances of the case;"

and where the Court has given a direction that a citation must be *personally* served on a defendant, it must be so served, and cannot be left for him at his residence, nor served on any one else at his residence, in his absence.[2] There can be no substituted service without special leave of the Court.[3]

The effect of this Rule was practically to do away with the four citations in each case; because the "directions" of the Court must be followed. Nevertheless, the Court will see that no injustice is done to a defendant by too short a notice; for there is the further safeguard by the retention of the old rule of the law of Holland—

"having due regard to the distance from this Colony of the place where the defendant is, or is believed to be, ... and the other circumstances of the case."

If a case similar to the one I have alluded to above were to arise now, with the same difficulty, as in that case, of reaching Batavia, the plaintiff might get his final decree for divorce within a year;[4] but as the means of communication with Batavia are so much quicker and more frequent nowadays, the plaintiff can get his final decree of divorce in six months

[1] See Chapter "*Restitution of Conjugal Rights.*"

[2] *Gamble* vs. *Sauer*, in 1890, 7 J., 323.

[3] *Milligan* vs. *Milligan*, 11 C. T., 288.

[4] See Chapter "*Divorce.*"

time. People who object to divorce will say that this facilitates it. But it is not so; the grounds of divorce are not altered, but only the *procedure* is diminished and the expense thereby considerably reduced; and the only ones who have a right to complain are the lawyers who, notwithstanding, actually suggested and carried the abolition of one of the actions!

It must be observed, however, that the Court is not by the above Rule limited to only one citation. If the necessity for two or more can be shewn, there is nothing to prevent the Court ordering it; but as a rule only one citation is ordered. Generally the petition so fully sets forth all the facts as to enable the Court to order only one citation, and to give full directions as to service and as to advertising. Another point in connection with the practice in Holland is the "Letters Requisitorial." This was where the Judge of one Province sent the citation to a Judge of another Province, where the defendant resided, or where his goods were, to be served on him there by the Deurwaarder, and also to issue execution there in case the judgment was not satisfied.

I have not been able to find whether this practice was in force in this Colony formerly. Probably it was, before we received our Charter of Justice. It certainly cannot be introduced now, as the Supreme Court has jurisdiction over the whole Colony by the ordinary proceedings, and where the jurisdiction of the lower Court fails the aid of the Supreme Court is required. But a principle somewhat similar, in one respect, to the Letters Requisitorial has been introduced into the Magistrates' Court Act by which a judgment of one Magistrate can be executed in another district upon the Magistrate of the latter district countersigning the writ, against the movables of a defendant, issued by the former.[1]

The Rule further provides that "personal" service must be effected on the defendant where possible; and if this cannot be done, then the citation must be published—

"once at least in the *Government Gazette* not less than one calendar month before the day fixed for the appearance of the defendant."

[1] See Chapter "*Writs of Execution.*"

Every effort must be made to effect personal service, of which there must be proof, by affidavit, to the satisfaction of the Court.[1] It is only when personal service cannot be effected that a publication in the *Gazette* becomes necessary.[2]

In addition to the publication in the local *Gazette*, the Court has sometimes also ordered a publication of the citation in another paper, either locally or abroad, where the defendant was last heard of or is still presumed to be.

As to the "directions," no hard and fast rule can be laid down, nor as to the "time" for the defendant's appearance; each must depend, as the Rule says, upon the "distance" and "the other circumstances of the case." A few examples only, to shew the practical operations of this Rule, must here suffice. For instance :—

(*a*) As to "Publication." In the case of *Hendrikz* vs. *Hendrikz*, decided in 1877 (not reported), in addition to the publication in the *Gazette*, the citation was published also once in the Griqualand West *Diamond Fields News* because the defendant, whose whereabouts was not known and who was supposed to have gone to Lake N'Gami, last resided in Griqualand West, that being also the nearest place to N'Gami where a newspaper was published.

In *Kohler* vs. *Kohler*, decided in 1877 (not reported), the citation was published in the London *Times*, because it was thought that some one of the defendant's family, who resided there and where he visited some time before, might see it, and his whereabouts was not known.

In *Enery* vs. *Ferreira*, decided in 1877 (not reported), the publication was also in the Fort Beaufort *Advocate*, because the defendant last resided there, and no one knew whither he afterwards went.

In *Kuhn* vs. *Kuhn*, decided in 1879 (not reported), the citation was also published in a Hamburg newspaper, because the defendant was believed to have gone to Hamburg.

In *Jones* vs. *Jones*, decided in 1879 (not reported), the publication of the citation was also in the Melbourne *Argus*, because the defendant was proved to have left for Australia. In this case the Court ordered *two* publications in the local

[1] *Nel* vs. *Harden*, 1 J., 205. [2] *Re Board of Executors*, 2 C. T., 107.

Gazette, and also *two* in the Melbourne *Argus*. In all the other cases there was only *one* publication. But this part of the order, which is so purely in the discretion of the Court, was, no doubt, owing to the "other circumstances of the case."

(*b*) As to the "Service." A personal service must be effected, if possible; if not possible, then a publication in the *Gazette*. But in the two following cases, in addition to the personal service, the Court ordered a publication in the *Gazette*.[1] These are the only cases in which this was done, but there were "peculiar circumstances" for this; otherwise the order for publication is, as a rule, in the alternative, *i.e.*, on failure of a personal service, then the publication.

In the case of *Da Costa* vs. *Da Costa*, 1902 (not reported), the Court ordered the process to be personally served, but in trying to do so there was some evidence that the defendant was putting difficulties in the way to avoid service, the Court thereupon ordered service to be made by means of a registered letter posted to the defendant's address.

In the case of *Saalfeld* vs. *Saalfeld*, 1902 (not reported), where personal service was also ordered, it seemed that the defendant's brother declined to give information as to his (defendant's) whereabouts, the Court thereupon ordered all process to be served on the brother.

Sometimes the order is specially asked for in the alternative, when it appears from the circumstances of the defendant's movements that a personal service cannot be effected; thus saving the time and expense of a fresh application to the Court for instructions, in case personal service cannot be effected. But sometimes this alternative order has been refused in cases where the Court has been satisfied that there was no reason to fear the defendant would be out of the way, or that personal service could not be effected.

In the case of *Kohler* above mentioned, in addition to the publication in the local *Gazette* and in the London *Times*, the Court ordered a service of a copy of the citation at 670, Hudson Street, New York, because his last letter was dated from there, though his whereabouts was not known.

[1] *Truter* vs. *Truter*, in 1876, and *Murray* vs. *Murray*, in 1877, neither of which is reported.

In the case of *Hendrikz*, above quoted, there was no direction as to personal service, because there was no means of communication with Lake N'Gami, and there was also sufficient proof of every effort having been already made to find out his whereabouts, but in vain.

In the case of *Cunningham* vs. *Cunningham*,[1] where bigamy was also alleged, and the defendant's whereabouts not known, in addition to the publication in the local *Gazette*, the Court ordered the service to be made at the last place of residence of the defendant; also at the residence of the alleged lawful wife in Liverpool; and at the residence of his mother in Dublin.

In the case of *Mathew* vs. *Mathew*, decided in 1878 (not reported), where the defendant had entered appearance to the action for restitution of conjugal rights, but had left the Colony and did not defend, the Court ordered the decree for her return to be served on her attorney, as well as the subsequent decree for divorce. But in the case of *Gladstone* vs. *Gladstone* (decided in 1897, not reported), the Court said that, *unless otherwise directed, the decree to return must always be served on the defendant and not on his attorney.*

(*c*) As to the "Time." The time for the appearance of the defendant is also in the discretion of the Court, which must take into consideration the circumstances of each particular case; the distance at which the defendant is alleged to be or might be; or whither he went; the means of communication thither, if any, and whether frequent, or at long or uncertain intervals.

In the case of *Cunningham*, the order was granted on the 27th of February, and the citation made returnable on 1st June. The period could hardly have been much shorter, as from February there was no term till 15th May. But since then, whenever it could be done, the Court has in every case shortened the period for service abroad.

In the case of *Hendrikz*, six weeks were allowed, because, though it was supposed he had gone to N'Gami, there was no actual proof, and he might still be in the Colony.

[1] B. for 1875, p. 99.

In the case of *Kohler*, the order was granted on the 31st August, and made returnable on the 19th December.

In the case of *Kuhn*, the order was granted on the 15th May, and made returnable on the 19th November.

There are many more cases (not reported), decided under the said Rule, that can be quoted if necessary; but it is unnecessary to do so, as they all confirm the established principles here laid down, that *personal service must be effected if possible, failing which, a publication of the edict must be made in the Gazette and in such other papers as the Court may order, and the return day of the edict must be fixed at a reasonable date.* This return day must be not too far off on the one hand, to cause unnecessary delay to the plaintiff, nor on the other hand within too short a time for the defendant to appear personally or by proxy if so minded.

Another point to be observed in connection with this subject is that, before the passing of the Rule, the edictal citation had, as a matter of course, to be first published in the *Government Gazette*, and then a copy of the *Gazette*, containing the edict, was served on the defendant when it could be served. This was introduced into Holland by no special rule or legislation, but by practice. But whether the *Gazette* could be served personally or not, a copy of the edict was also posted on the main door of the Court from which the edict issued. From this came the expression *edictum ad valvas curiæ*—the edict at the doors of the Court—as distinguished from any other kind of edict. Formerly in Holland there was a difference between the *ad valvas curiæ* edict and the ordinary *Clausule van Edicte*, viz., that the former was resorted to only when the domicile of the defendant was not known, and the latter when it was known and the edict was sent through the post. But this distinction gradually fell into disuse in the latter part of the last century, and the edicts were all called *ad valvas curiæ*. It was thus absolutely necessary to an edictal proceeding that the edict should be posted by the Sheriff on the main (or public) door of the Court, and a return made by him to that effect. The whole of the Dutch practice was followed by us here also till the passing of the new Rule mentioned. Since that Rule this practice of post-

ing on the door has not been followed by all the attorneys, and whoever did follow it certainly posted the edicts on the wrong door—at a private entrance. The main or public door of the Supreme Court is the large one opening on to the Adderley Street side. But this posting on the door is not necessary at all now since the new Rule, which depends upon the "directions" of the Court. By the Placaat of the 22nd November, 1735, it was punishable, in the discretion of the Court, for any one to take off an edict properly affixed to the door of the Court.

In a liquid document sued on by edictal process the defendant must also be called on, as in an ordinary provisional sentence summons, to acknowledge or deny his signature or the validity of the debt, and to plead to the provisional claim, &c.

In liquid cases, in the edictal process for provisional sentence, where the citation has been personally served on the defendant, provisional sentence could always be obtained thereon without filing an "Intendit" by the mere production of the document sued on,[1] but where no personal service is effected the citation must be published in the same manner as in illiquid cases; and when the citation has not been personally served on the defendant, provisional sentence cannot be obtained upon the document sued on without filing an "Intendit," and proceeding from this stage as in an illiquid case, although at the trial the mere production of the liquid document, without further evidence, is sufficient to obtain judgment on.[2] Since the decisions of these cases the 329th Rule of Court has been published (March, 1880). By sub-section (*d*) it is provided that when a defendant in an illiquid case, *but for a debt or a liquidated demand only*, is in default of appearance, the plaintiff may set the case down on the summons for judgment without filing a declaration. It is true the Rule in question specially excepts "a summons . . . for provisional sentence." But this exception applies only to the ordinary summonses for provisional sentence, and

[1] *Dunell and Stanbridge* vs. *Van der Plank*, 1 M., 140.

[2] *Trustees of Stoll* vs. *Hope*; *Trustees of Stoll* vs. *Munro*, 1 M., 139; *Enery* vs. *Ferreira*, decided in 1878, not reported; see also Merula, 2, 2, 5.

not to edictal citations. Nevertheless for the last few years, since the publication of the last Rule referred to, though it is not applicable directly, the practice has been the same with regard to provisional-sentence-edictal-process not personally served, as those personally served, and "Intendits" are no longer required to be filed therein.

The "*Intendit*" here mentioned is the old Dutch technical term for what we call "Plaintiff's Declaration," or what is called in the English law "Statement of Claim." The Rule above referred to, as to edictal citations, goes no further than what I have mentioned, and therefore this term is still in force in our practice. Van der Linden[1] gives the following definition of "Intendit:"—

"It is understood to be a writing containing a statement of the case, of the proceedings thereon, and of the defaults granted; and finally a conclusion, which is always inserted therein, that the defendant shall be barred from all pleas or exceptions, peremptory, declaratory, or dilatory; and also from all means of defence in law which he otherwise might have availed himself of had he appeared; and further with respect to the cause itself or the merits, that he be condemned conformably with the nature of the case and demand."[2]

On the return day of the edictal citation the plaintiff must prove its personal service, by affidavit, and where no personal service has been effected proof must be shown, also generally by affidavit, that every effort has been made to find the defendant but without success. He must also prove the publication in the *Gazette* and such other paper as the Court may have ordered the edict to be published in, by handing in copies of all these papers containing the citation. The same principle applies to the "Intendit" and to all other process ordered by the Court in edictal proceedings. Under the old practice the "Intendit" was never published, and was never served on the defendant, nor was notice of trial ever published or given him. It was sufficient, if the defendant was in default on the citation, to file the "Intendit" at once, and to forthwith set the case down for trial for an early day. But under the new Rule the Court may order a service, or publi-

[1] 3, 1, 13.

[2] See also Wassenaar, Vol. 1, Chap. 4, §§ 57–62; Instr. v. t. Hof; Art. 108, and Hooge Raade, Arts. 252 and 253, in the Placaaten above mentioned.

cation, of the "Intendit," and the notice of trial. In the case of *Barendse*, already mentioned, where personal service of the summons was made the Court ordered the "Intendit" and the notice of trial to be published in two successive issues of the *Gazette*, without any notice thereof being given to the defendant in Natal. And in the case of *Kuhn*, also mentioned above, the "Intendit" was ordered to be published in two issues of the *Gazette*, and no notice of trial given. But to save time and expense the present practice of the Court on the hearing of the Petition is, in giving instructions as to service of process, to order also that the Intendit, the Order of Court, and the Notice of Trial shall be served, or published, at the same time with the Citation. It is always better, therefore, in the applications for "directions" as to the service of the edict, to apply also for instructions as to the "Intendit" and notice of trial and all other necessary process. Whatever the new Rule has not altered, we are still bound to follow in the old practice as derived from the law of Holland. By the old practice a personal service of the edict was never insisted upon by the Court, though possible to be made, as it was really not necessary; but it was to the interest of the plaintiff to get a personal service made if possible, as it dispensed with the publication of the remaining edicts.

The service or publication of the "Intendit" and other process being made, the plaintiff must proceed with the rest of the case, as in other default cases, except as to notice of trial. And if the defendant is allowed by the Court to purge his defaults, and to defend the action, then he or his attorney is entitled to be served with all notices and process as in other defended cases. But in granting this order the Court sometimes imposes on the defendant certain terms, the most usual of which are, that he shall first repay the plaintiff all the costs occasioned by reason of the defaults, and that he shall plead and go to trial by a certain date.[1]

Questions are sometimes asked why the edict should be issued and published in the name of the Court, instead of that of the Sovereign. The reason is, that it had its origin in the Prætor's Court, where it was issued in the name of

[1] Merula, 2, 2, 4.

that Court, and from those days till now, in all ages and in all countries, all orders of Court—for we cannot issue an edict without a special order of Court—have been, and are still, issued in the name of the Court. The ordinary summons can be issued without such an order, though by one of our Rules of Court it is to be "tested" in the name of the Chief Justice, and the form gives it in the name of the Sovereign. The practice to issue summonses in the name of the Sovereign first began in England. In no other country is this so, except now with us in the ordinary summons. All orders of our Courts are still issued in the name of the Court. The Rule 273 did not alter this as to edictal citations, nor did it alter the old technical term "Intendit," which we still use. But though it is perfectly legal to issue Edictal Citations in the name of the Court, the general practice of late years has been, and sanctioned by the Supreme Court, to issue them also as all Summonses are in the name of the Sovereign, because the new Rule of Court (273) as to Edictal Citations throughout uses the word "summonses."

Another question frequently asked is, "Of what use is an edictal citation when a defendant has left the country and has no property to be attached?" The answer is simple. There may be instances where a judgment in such a case will be of no practical value to the plaintiff, and it will be for him to decide whether he will go to the expense of obtaining one. But there are many cases where such a judgment is the only way of maintaining one's right. Apart from social questions such as divorce, &c., a plaintiff's cause of action may have arisen in this country, and it may be necessary for him to initiate his action here, if ever he intends to enforce his rights. I have already mentioned instances where persons summon "all the world," or "all whom it may concern;" or there may be instances where other future rights are involved, such as servitudes or prescriptions; or, as is the case of co-debtors or co-sureties who have renounced no exceptions, when one of them is absent and has left no property, it is necessary, in order to come down upon the others for the whole debt, that he must first be excussed, an edictal process being necessary against the absent one to enforce judgment

against the remaining ones; or a defendant may be absent to-day, and without property, but he may turn up some day, or he may have property again. The debt is liable to be prescribed, but a judgment will keep it open for at least a quarter of a century. Besides, by the comity of nations certain judgments are recognised and can be enforced abroad, while the case could not conveniently have been initiated abroad. In short, there are the same reasons for proceeding or not by edictal citation in the case of an absent person who has left no property, as in the case of any other ordinary summons against a person present who has no property. It is purely a question for the plaintiff to consider of what advantage the judgment will be to him when he gets it.

In an *in formâ pauperis* Edictal Citation suit, when publication becomes necessary, the Citation, Intendit Order, and Notices of Trial need not be published *in extenso*, but only a notice to the defendant containing a *précis* thereof signed by the plaintiff's attorneys and approved of by the Registrar of the Court.[1]

Petition to sue by Edict for the cancellation of a sale of landed property.

(Heading.)

The petition of A.B. of . . . .
Humbly sheweth—

1. That on the . . . . day of . . . . your petitioner sold to C.D. of . . . . certain erven situate in the village of . . . . for the sum of £ . . . . sterling (*here state conditions, if any, or for cash; for instance*), on the condition of his paying one-fourth thereof within three months after the date of sale, and the balance nine months thereafter when transfer will be given of the erven.

2. That your petitioner and the said C.D. duly made the Declarations of Sale and Purchase of the erven, and C.D. also paid the transfer duty on the purchase amount, and also paid your petitioner one quarter of the purchase price within the time agreed upon.

3. That the said C.D. left this Colony for the Transvaal about . . . . years ago, and he is at present living at . . . ., in the Transvaal; and though he has frequently been written to, to complete the purchase, he has failed to do so.

4. That the balance purchase money is still due to your petitioner: and that no transfer of the property has passed to C.D.

[1] *Cadley* vs. *Cadley*, 2 C. T., 392, and *Pirie* vs. *Pirie*, 7 C. T., 11.

5. That your petitioner is desirous either to obtain the balance purchase money or to cancel the sale of the said erven.

Wherefore your petitioner humbly prays that your Lordships will be pleased to allow him to sue the said C.D., by edictal citation, either for the fulfilment of the conditions of said sale, by paying the balance still due, and taking transfer of the said erven, or failing to do so, within a time to be fixed by this Honourable Court, then for a cancellation of the said sale :—And that your Lordships will further be pleased to give directions as to the mode of serving the citation, and all the other processes, and to fix the time for the defendant's appearance to the said citation.

And your petitioner as in duty bound will ever pray.

Affidavit of Verification.

NOTE.—*In every case of an edictal citation, where an* "Intendit" *is necessary, it may now be served, on the defendant, or published, as the case may be,* at the same time with the citation and notice to plead, and of trial. *Specimen forms of* Citations *and* Intendits *with notices and affidavits are given at the foot of the Chapters on "Malicious Desertion" and "Divorce." The* Intendits *are drafted by Counsel and follow the usual forms of "Plaintiff's Declaration," therefore no other samples are given here.*

Petition to sue by Edict to set aside a cession of a mortgage bond on the ground of undue preference.

(Heading.)

The petition of A.B. and C.D. of . . . .

Humbly sheweth—

1. That your petitioners are the trustees of the insolvent estate of E.F. of . . . ., whose estate was placed under sequestration on the . . . . day of . . . .

2. That on the . . . . day of . . . . one G.H. of . . . . passed a mortgage bond in favour of the said E.F., for the sum of £ . . . . sterling, and for which the farm . . . . was duly hypothecated.

3. That on the . . . . day of . . . . the said E.F. . . . . ceded the said bond for the full amount thereof to J.K. . . . ., then of . . . ., in this Colony, but at present of . . . ., in Germany.

4. That it appears from the books of the said insolvent that at the time of the cession of the said bond he was indebted to the said J.K. in the sum of £ . . . . sterling, and that this bond was given in part payment of the said debt.

5. That from an examination of the affairs of the said insolvent it further appears that at the time of the cession of the bond aforesaid he was in insolvent circumstances, and must therefore have given the cession with the intention to prefer, and did thereby prefer, the said J.K. over his other creditors.

6. That your petitioners are desirous of suing the said J.K. of . . . ., in Germany, by edictal citation, for a cancellation of the said cession.

Wherefore your petitioners humbly pray that your Lordships will be pleased to allow them to sue the said J.K., by edictal citation, to shew cause why the said cession shall not be set aside, as an illegal and an unlawful cession, made by the said insolvent, with the intent to prefer the said J.K., who was a creditor of his, before his other creditors, and to have the said bond declared to be part and parcel of the assets of the estate of the said insolvent, and as such vested in his said trustees: And that your Lordships will further be pleased to give directions—

(*Here conclude as in preceding petition.*)

The citation on the preceding petition.

Citation by Edict. (*See note at foot.*)

The Right Honourable Sir John Henry de Villiers, K.C.M.G., Chief Justice, and the other the Judges of the Honourable the Supreme Court of the Colony of the Cape of Good Hope, do hereby make known—

To J.K., of . . . .

That whereas A.B. and C.D. of . . . ., in this Colony, in their capacity as trustees of the insolvent estate of E.F. . . . . of . . . ., petition this Honourable Court for leave to sue by edict J.K. . . . ., of . . . . A., in Bavaria, beyond the jurisdiction of this Colony, to shew cause why a certain cession, bearing date the . . . . day of . . . ., by the said insolvent to the said J.K. . . . . of a certain Mortgage Bond for the sum of £ . . . ., passed by G.H. in favour of the said insolvent on the . . . . day of . . . ., shall not be set aside as an undue preference and therefore illegal.

Now therefore this Court, having taken the prayer of the said Trustees into consideration and granted the same accordingly, by these presents doth summon the said J.K. of . . . . to appear before the said Supreme Court on the . . . . day of . . . . at 10 o'clock in the forenoon, either in person or by proxy, and to shew cause, if any, why the said cession of the said bond shall not be set aside as an illegal and unlawful cession, so made by the said insolvent with the intent to prefer the said J.K., who was a creditor of the said insolvent, before his other creditors; and also to have the said bond declared to be part and parcel of the assets of the estate of the said insolvent, and as such vested in the said trustees.

Thus done and granted in the Supreme Court of the Colony of the Cape of Good Hope, at Cape Town, on the . . . . day of . . . ., in the year of our Lord, 1891.

. . . . . .

Registrar of the Supreme Court.

. . . . . .

Plaintiffs' Attorneys,
De Lettre Chambers,
Church Square, Cape Town.

(NOTE.—*The heading of this form, though perfectly legal, has of late been varied and sanctioned by the Supreme Court, so as to allow the Edict to be issued in the name of the Sovereign, as in summonses, instead of in the name of the Court.*)

CHAPTER VII.

ARRESTS.

THIS subject is justly regarded by the profession as one of the most important in their practice. Its importance is not because of the actions which frequently arise out of it—oh! no, such a thought is too mundane for lawyers!—but because it affects the liberty of the subject, and very serious injury might sometimes be done to the defendant, or loss caused to the plaintiff, by the issue of an illegal or informal arrest. I shall therefore endeavour to state a few general principles—sufficient, nevertheless, for all practical purposes—in this brief treatment of a very wide subject.

The word "arrest" is of French origin (*arrêter*) and the purpose of arrest is twofold: (*a*) To enable a creditor to prevent the departure of a debtor who meditates flight from the Colony without paying or securing his debts, to avoid an anticipated or a pending action; (*b*) To found jurisdiction on a person who does not belong to the jurisdiction of the party arresting, but who temporarily comes within it intending to leave it again soon.

In either case the object of arrest is to compel the person arrested to give security to answer the anticipated or the pending action and to abide by the judgment thereon.

Every person who has the *legitima persona standi in judicio*, and who has a claim against another, may cause him to be arrested,[1] as also any one duly authorised thereto by a power of attorney.[2] So too an attorney who has authority to act for another has the power to cause the debtor of his

[1] See Chapter "*Actions.*"

[2] Kersteman, Chap. 26.

principal to be arrested, though no special power to arrest may have been given.[1] Women may arrest their debtors.[2] A wife may also cause the arrest to be made in the name of her husband, without his knowledge or permission, and it will hold good if he does not afterwards dispute it.[3]

Arrests are either civil or criminal; but in this Chapter I shall treat of arrests only in so far as they affect civil suits.

An arrest may be made (A) Of a person, (B) Of his goods.

A.—ARREST OF A PERSON.

This may be of two kinds:

1. *In securitatem debiti*, and
2. *Jurisdictionis fundandæ causâ* (or *gratia*).

I. The *in securitatem debiti* arrest is very common, and is recognised also by the Roman law. It is used whenever a debtor is *suspectus de fugâ* (suspected of flight); that is, whenever the debtor, being under the same jurisdiction as the creditor, is suspected of an intention to leave that jurisdiction or country for another, without having paid his debt to his creditor; and this suspicion is confirmed if it can be proved that he either meditated flight at once, or if by words spoken or written by him, or by his acts and conduct, it can be reasonably inferred that he is preparing to leave the country. In every case where there is a reasonable belief in the mind of the plaintiff, either from the actions, conduct, or expressions of the defendant, that the latter contemplates leaving the Colony on a favourable opportunity, the plaintiff is justified in issuing a writ of arrest; for instance, where a debtor tells another, or it is discovered by other means, that he intends to leave the Colony by a certain day, or shortly, or by a certain opportunity; or if he takes his passage in a certain ship, or by a certain conveyance, whose destination is beyond the boundaries of the Colony.[4]

[1] Zutphen Ned. Prac., p. 50; Vroman, 1, 1, 35; Wassenaar, 1, 1, 20; and Bort van Arresten, 2, 4–6.

[2] Voet, 2, 4, 34–36.

[3] Berg. Ned. Adv. Bk., Vol. 4, Cons. 54.

[4] Van der Linden's Supplement to Voet, Bk. 2, Tit. 4, § 18; Jud. Prac., Bk. 2, Tit. 18, § 1; Vroman, 1, 1, 25, and 3, 1, 20; Van Alphen, Chap. 24; Voet, Buchanan's tr. 2, 4, 18–26.

It is not essential that the movements of the defendant should be secret so as to come under the term *suspectus de fugâ*. He may openly avow his intention of leaving the Colony, and publicly make preparations for that purpose; yet if he fails to settle with his creditor a reasonable time before leaving, he may be arrested as a *suspectus de fugâ*.[1] And it was held by the Supreme Court that the mere contemplated departure from the Colony of a debtor is sufficient to warrant an arrest; which departure need not be fraudulent, or with a view to defeat the plaintiff's claim:[2] and also that one of two or more partners under the same jurisdiction, although contemplating only a temporary absence from the Colony, may be arrested to give security for the partnership debt.[3] These two decisions have of late been to some extent modified in the following four cases: *Van Blommestein* vs. *Van Blommestein; Fraser* vs. *Sivewright; Harsant* vs. *Pullinger;* and *Lippert* vs. *Adler.*

But though the aforesaid are the general principles upon which a plaintiff would be justified in arresting a defendant for suspicion of flight,[4] the Supreme Court has of late years held that, where the defendant could satisfy the Court that he was only leaving the Colony for a temporary purpose, and that he had considerable property in the Colony, sufficient to meet the plaintiff's claim, he should not be arrested; or, if arrested, should be discharged from arrest;[5] and carrying the same principle a little further, the same Court has also decided, on the application of the plaintiff that the defendant should give security for costs in a pending action, that, though the defendant may have no property to satisfy the plaintiff's claim, yet if he can satisfy the Court that his contemplated absence is only temporary, and *bonâ fide*, he cannot be arrested, nor called upon to give security. As this decision is a very important one, and is not yet reported, I give here the outline of the Chief Justice's judgment in the case I allude to, viz.,

[1] Merula, 4, 2, 25; Loenius, 48; Vroman, 1, 1, 25.

[2] *Roberts* vs. *Tucker*, 3 M., 130.

[3] *Joseph* vs. *Abrahams*, decided Supreme Court, 23rd July, 1864, not reported.

[4] See also *The Master of the Supreme Court* vs. *A.B.*, 3 M., p. 138.

[5] *Van Blommestein* vs. *Van Blommestein*, 1 F., 81; *Fraser* vs. *Sivewright*, 3 J., 342; and *Harsant* vs. *Pullinger*, Ibid. 343.

that of *Lippert* vs. *Adler*, decided 26th May, 1887. The Chief Justice said:

"The mere fact that the defendant intended leaving the country was not, in his opinion, sufficient to justify the Court either in arresting him, or in ordering him to give security. No doubt there was a rule in regard to plaintiffs who are foreigners, that they may be called upon to give security, but the same rule had never been applied to defendants, *unless there was reason to believe that the object of the departure was either to defeat or delay the plaintiff's claim.* In the consideration of that question it was an *important ingredient whether the defendant had property in the Colony, and whether he was going away only temporarily.* In the case of *Fraser* vs. *Sivewright*, and *Harsant* vs. *Pullinger*, those questions were considered, for they were important elements in the further consideration of the objects the defendants had in leaving. In the present case there was no evidence that the defendant possessed immovable property, but there was sufficient evidence before the Court that his departure was for a temporary purpose only, and inasmuch as the *Court was satisfied that his departure was for a temporary purpose only, and that there was no intention of defeating or delaying the creditors*, he did not come within the class of cases in which the defendant could be called upon to give security, he not being at all *in fugâ.*"

It will be noticed, from what has been stated, what the grounds or reasons are which would justify a creditor in causing the arrest of his debtor, and that is for the defendant to prove the exceptions here mentioned; for the plaintiff may not be aware, when he issues the writ, what defence the defendant may have to it, and therefore he will still be justified in issuing it on first complying with the 8th Rule of Court, because, as was remarked by the Court on another occasion and for another purpose in the case of *The Master of the Supreme Court* vs. *A.B.*,[1]

"there was a great distinction in law between the facts, which it was sufficient for the plaintiff to allege on oath, in order to obtain a writ of arrest, and by the arrest to prevent the defendant's leaving the Colony before the Judges should have an opportunity of considering the merits of the arrest; and the facts which it was necessary for the plaintiff to establish to the satisfaction of the Judges, to prevent them from dissolving the arrest on the application of the defendant."

But of course if the plaintiff has full knowledge of the grounds which the defendant may successfully urge, why he

[1] 3 M., 138.

should not be arrested, or, if arrested, discharged from the arrest, then he will not be justified in ordering the arrest of such a defendant; nor of a defendant whose departure he is aware is only for a temporary and *bonâ fide* purpose, and with no intention to defeat or delay his creditors, or who has sufficient property in the Colony to satisfy the debt.

But when a person owes a debt which he cannot possibly pay, he cannot avail himself of any of these defences, and he is not, therefore, privileged from arrest in arrestable causes.[1]

II. The *jurisdictionis fundandæ causâ* arrest is the arrest of a stranger or foreigner, or of his goods, to found the jurisdiction of the Judge over him, or in regard to them. And this kind of arrest has been mostly introduced to enable the plaintiff to litigate at his own residence and there recover his debt from the foreigner.[2] The Court of one country has no jurisdiction over a person in another country, but if that person comes within the jurisdiction of the Court, he may then be arrested so as to create or found the jurisdiction, and he must in that case be either imprisoned and abide the result of the action, or if he gives satisfactory security to abide by the result of the action, he is released from arrest; but the mere fact of the arrest, if legally made, founds the jurisdiction, and the jurisdiction once founded is as good as if the person had never been out of the jurisdiction of the Court. It is not required that the defendant should specially come to the same jurisdiction of the plaintiff in order to be arrested and so found the jurisdiction, for this arrest may be made even when the defendant is only casually, or quite accidentally, within the jurisdiction of the plaintiff, and intends leaving it again shortly. If he has no intention of leaving the jurisdiction shortly, and there are reasonable grounds for supposing that he intends to remain to answer and abide by the action to be instituted by the plaintiff, then no arrest is to be made, but the usual proceedings by summons must be taken against the defendant. Of course if he attempts to leave before the case is finally settled, he may be arrested, and so may he in

[1] Van der Linden Jud. Prac., 2, 18, 1, and his Supplement to Voet, 2, 4, 18.
[2] Voet, 2, 8, 7.

his turn arrest the plaintiff who intends to leave before the case is finally settled.

This kind of arrest is not so common or universal as the former. It was not in force in the Roman law, and was introduced into Holland in ancient days, and obtained the force of law by custom, for the better security and in favour of commerce, because the Dutch merchants would not transact business with those foreigners who could not be arrested merely because they were foreigners, if after making their purchases they left without settling their accounts.[1]

But this kind of arrest cannot be made under the 8th Rule of Court. It must be by application to the Court for security, failing which for an arrest. In the case of *Schunke* vs. *Taylor and Symonds*,[2] the Chief Justice said:

"It has been more than once decided that these rules (the 8th and the 14th) were not intended to deprive the Court itself of the power to order the arrest of a defendant or require security from him in cases, although not falling within these rules, when the law authorizes such arrest or security. . . . It is obvious that these rules apply only to the case of resident defendants. In order to confirm jurisdiction in an action against a person not domiciled in this Colony, an application must be made to the Court for the attachment of his person or property."[3]

According to the usual rule of law no person can be sued but before his own Judge, *actor sequitur forum rei.*[4] But to this rule there is the exception in the arrest *jurisdictionis fundandæ causâ:* and this applies to whether the person of the debtor or his goods are detained.[5] But in the absence of any jurisdiction *ratione domicilii, ratione rei sitæ,* or *ratione contractus,* the Court ought not to assume jurisdiction by means of an attachment.[6]

Proceedings on arrest.—In Holland no writ of arrest can be issued without the authority of the Court. An arrest is

[1] Groenewegen ad. Cod., 3, 18; Peckius "Handopleggen en Besetten," cap. 1, No. 4, and cap. 35, Nos. 1 and 4; Merula, 4, 2, 25; Voet, 2, 8, 1, 2, 6 and 10; Bort, 1, 16-21 and 2, 10; On "Jurisdiction" generally, see Story's "Conflict of Laws," Chap. 14, §§ 530–583.

[2] 8 J., 103.

[3] See also *Solomon* vs. *Wolff*, 8 C. T., 184, and 15 S. C., 152.

[4] See Chapter "*Actions.*"

[5] Merula, 4, 2, 25, and notes; Bort, 1, 1, 3, 5, and 3, 1, 3.

[6] *Einwald* vs. *The German West African Company*, 5 J., 86; and *McLeod* vs. *Benjamin*, 2 C. T., 119; *Schunke* vs. *Taylor and Symonds*, 8 J., 103; *Ellerton Syndicate* vs. *Hutchings*, 3 C. T., 124; *Ex parte Jackson*, 13 S. C., 13; *Solomon* vs. *Wolff*, 8 C. T., 184, and 15 S. C., 152.

looked upon as a very serious matter, especially the arrest of a person, who is thereby deprived of his liberty; it is regarded also as a species of execution, and therefore the granting or withholding it lies entirely in the discretion of the Court, according to the circumstances of each case. To obtain this order, a petition must be presented to the Court setting forth briefly the facts of the plaintiff's case, and stating the grounds on which he resorts to this extraordinary remedy, and the Court must be satisfied, from the facts laid before it, that the petitioner has a just cause for his application, and that the order for the arrest should be granted.[1]

This law is in force also in this Colony except in so far as altered by our 8th Rule of Court. This alteration and difference I shall presently point out.

In Holland, again, when a defendant has reason to believe that an application for his arrest may at any moment be made, he can forestall the plaintiff by presenting a petition to the Court for a Request "Antidotaal." In this petition he sets forth the grounds of his belief, or states certain facts, why he apprehends that the plaintiff intends to apply for his arrest, and concludes with a prayer "Antidotaal," that is, that the Court may declare that there exist no grounds for any arrest in so far as regards the claim, or demand, or complaint, of the plaintiff, and that the plaintiff's threat or intention to arrest is unfounded and unlawful; and that if he applies for an arrest it may not be granted. The plaintiff must have notice of this application, and the Court will decide whether to grant or to refuse it in the same way as it would if the plaintiff had applied for the defendant's arrest.[2]

This law is also in force in this Colony, though I am not aware of any local decision on this point.

It might be asked, why should the defendant resort to this, what I take the liberty of calling "antidotal" or "protective" order, when he might either oppose the plaintiff's application for an arrest, or, when the arrest is made, move, by anticipation, to have it set aside? The simple answer is,

[1] Vroman, 1, 1, 25, and 3, 1, 20, and notes by Middellant; Jud. Prac., 2, 18, 4; Bort van Arresten, 1, § 2, and 3, §§ 3–6, 17, 19, 22–27, and 30–34; Merula, 4, 2, 25, 2; Peckius, 2, §§ 4–6; Buchanan's Voet, 2, 4, 18–26.

[2] Jud. Prac., 2, 18, 5; Bort, 1, 22; and Van Alphen, p. 677.]

that by delaying his application so long as he likes the plaintiff may very seriously inconvenience the defendant by moving the Court for his arrest: or by arresting him, under the 8th Rule of Court, at the last moment, whereby he may miss a favourable opportunity of departure, whether by land or sea, or suffer other loss or damage; and if the arrest should afterwards be confirmed by the Court, the defendant has no remedy for compensation against his opponent. It is to prevent this loss, or damage, or disappointment, or uncertainty, that the "antidotal" or "protective" remedy is given to the defendant, by which he can have the plaintiff's right to arrest him at once established before it is too late.

Our Supreme Court has frequently decided that a plaintiff is not to act very hastily in causing the arrest of a person under the 8th Rule of Court.[1] He must wait until the defendant's departure is "imminent," and this must depend upon the circumstances of the contemplated departure—how, and when, and by what opportunity. No definite time can be fixed. A fortnight before the time fixed for departure, when both parties are in the same place, and when the final place of departure is within close proximity, is too soon. A day or two before is, under such circumstances, reasonable. It has also frequently happened that a plaintiff has no knowledge of his opponent's intended departure till within an hour or so of the time, when he has barely an opportunity to issue a writ of arrest, and that the arrest is made just as the vessel is leaving the docks; or it may be that the plaintiff purposely delays till the last moment, in order to inconvenience and annoy the defendant as much as possible; or it may be, as most frequently happens, that the defendant, in the hope of escape, keeps out of the way till the steamer moves off, when he jumps on board and is at once arrested.

Now, all the disappointments can be prevented by the defendant's anticipating the move of the plaintiff by applying for a protective or antidotal order.

When the plaintiff intends to apply to the Court for an order for an arrest, which he cannot take out under the 8th Rule of Court, he should give the defendant notice thereof.

[1] See also *Norden* vs. *Sutherland*, 3 M., 133.

But instances might happen where this notice cannot be given, either because the defendant secretes himself, or his whereabouts is not exactly known, or there is no time to give him the notice before his departure, or for some other cause: the Court may then, on the *ex parte* application of the plaintiff, and if under the circumstances there is an immediate necessity, order the arrest of the defendant.[1] In Holland the Judge could not order an arrest for a small debt. The amount is not stated, but is left to his discretion. As by our 8th Rule of Court no arrest can be made where the claim is under £15, it is a fair criterion for a Judge to follow where he has to exercise his discretion as to the amount.

Under the 8th Rule of Court, a writ of arrest may be issued without an order of Court, or of a Judge, and without notice to the defendant, provided it is only to

"compel the appearance of the defendant to answer any claim or demand, and abide by the judgment of the Court therein, and provided also that the cause of action shall have originally amounted to the sum, or be of the value, of £15 or upwards, exclusive of any costs or charges, &c."

In the case of *Schunke* vs. *Taylor and Symonds*,[2] the Supreme Court decided that this 8th Rule of Court applies only to resident defendants, and that in order to found or confirm jurisdiction in an action against a person not domiciled in this Colony, an application must be made to the Court for the attachment of his person or property *ad fundandam jurisdictionem*. This decision was approved of by the same Court in the case of *Solomon* vs. *Wolff*,[3] and it was further held—

"that it was unnecessary to discuss the nature and period of residence required to justify the summary process of arrest, but it is sufficient to say that a residence sufficient for an order or summons would be sufficient for a writ of arrest against a defendant about to remove from the Colony. . . . Where the objection is raised that the defendant is a non-resident, the Court would discharge the writ, but would also then and there make an order for the attachment of his person *ad fundandam jurisdictionem* and for the giving by him of security."

[1] Peckius, 4, 5, and notes thereon; and *Van Blommestein* vs. *Van Blommestein*, 1 F., 81.

[2] 8 J., 103.

[3] 8 C. T., 184.

This Rule contemplates an arrest for only a "claim on demand" *due*, and thereby to initiate an action;[1] and therefore for whatever other cause, not included in this Rule, and for which we wish to arrest—for instance, where the debt is not yet due; or to stop the departure of a suitor in a pending action till security is given; or to stop the flight of an insolvent till his estate is liquidated, &c.—we must follow the law of Holland, and obtain an order from the Court or a Judge to arrest. This Order may be obtained either by a notice of motion calling on the party to give security or by petition to the Court or a Judge for a rule *nisi* calling upon the party to find security.[2]

A writ of arrest when once issued under the 8th Rule of Court stands for a summons in the action, and no further or other arrests can be made in that cause without an order of a Judge; and so in like manner has the Supreme Court decided that no writ can be issued under the 8th Rule of Court for the arrest of the defendant against whom a summons is in existence for the same cause or action, but the defendant can in such a case be arrested only on a writ issued by order of the Court or a Judge.[3]

If, then, a plaintiff having an action pending wishes to arrest a defendant under the 8th Rule of Court, he must first withdraw the existing summons. But as he can gain no benefit by this step which he cannot get by an order from a Judge, he would act injudiciously in withdrawing the summons; unless, indeed, he can shew that the circumstances have so materially altered since the issuing of the summons and its withdrawal as to justify this step and the arrest.

It is worthy of note that until the decision of the four recent cases above mentioned, the first of them, *Van Blommestein's* in 1880, the points therein decided seem never before to have been judicially mooted in this Colony; or, if so, no decision was ever given thereon. And I well remember the argument and the judgment in the case of *Joseph* vs. *Abrahams* in 1864 (quoted above), and how the late Sir Sydney (then

[1] See also *Cohen* vs. *Sytner*, 14 S. C., 13.

[2] See also *Ross* vs. *Farmer*, 5 C. T., 13; *Heydenrych* vs. *Lynch*, 5 C. T., 50.

[3] *Van Blommestein* vs. *Van Blommestein*, 1 F., 81; *Fraser* vs. *Sivewright*, 3 J., 342; and *Harsant* vs. *Pullinger*, Ibid., 343.

Mr. Justice) Bell, in concurring with the other judges in confirming the arrest, expressed his indignation and regret that he had to do so, inasmuch as it was alleged, and not denied, that the debt was a partnership debt; that the defendant intended to go to Europe only to buy goods for his firm, that he would soon return, and that there was no question of the firm's stability. I do not remember all the authorities quoted in that case, but my impression is that the Court relied chiefly on the 8th Rule of Court and *Roberts* vs. *Tucker*.[1] And until the decision of, especially, the case of *Harsant* vs. *Pullinger* in 1883, the profession always acted upon the decisions in *Joseph* vs. *Abrahams*, and *Roberts* vs. *Tucker*. The decisions in the two cases just named are the more surprising when we bear in mind that the law of Holland on arrest was not done away with by the 8th Rule of Court, which practically merely facilitates the issuing of a writ of arrest for an action on claims or demands due, *without an order of the Court or a Judge*, and that it does not deprive a defendant of any of his common law rights or privileges in actions or defences on an arrest.

Of course the decisions in *Roberts* vs. *Tucker* and in *Joseph* vs. *Abrahams* have not been wholly over-ruled by those in the four recent cases above named, but only to the extent where the Court is satisfied that the defendant has goods, or that his departure is only temporary and not with a view to defeat his creditor.

It is surprising how many decisions have been given on the interpretation of the 8th Rule of Court, and especially as to the practice to be observed thereon. Most of them have been on the ground of the irregularity of the initiatory affidavit. I shall here mention only the most important ones.

The affidavit on which the arrest is to be founded under the 8th Rule of Court must be direct and positive; it must contain a true description of the person and place of abode of the party making it; a statement of the true sum due to the plaintiff, and a sufficient setting forth of the cause of action; it must state also whether the plaintiff has any mortgage, pledge, or security for his demand; (if he has any security, it

[1] 3 M., 130.

should state the nature and extent of it, and whether it is sufficient or not therefor); and when the claim is not for a positive sum due; for instance, where the demand is for unliquidated damages, as for libel or slander, or for the unlawful detention of goods, &c., the affidavit should also state that the value in dispute between the plaintiff and the defendant is worth to the former at least £15, because no arrest can be made unless the claim amounts to £15 exclusive of costs; and that the sum in question, or so much thereof as may be awarded or found due to the plaintiff, remains wholly unsecured to him. The affidavit should finally fairly and fully state the plaintiff's belief and his grounds for believing that the defendant is about to remove from the Colony, or is making preparations to leave it.[1]

This affidavit cannot be framed with too much care, for if it is in any respect irregular or informal, it is, with all the subsequent proceedings thereon, void *ab initio;* and it is right that this should be so, considering the great powers given to the plaintiff under the 8th Rule of Court. The plaintiff cannot by an affidavit, subsequent to the arrest, make good any defect, or supply any omission, in the affidavit on which the arrest was founded.

Thus an affidavit on which an arrest is to be founded must be direct and positive as to the defendant, and cannot be in alternative form, as, for instance, that an assault was committed by "one or other of them."[2]

It must be direct and positive as to the cause of action, otherwise it will be void,[3] and also as to the cause of action and the other particulars of the 8th Rule of Court.[4] It will be void again if it does not contain any description of the person or place of abode of the party who made it.[5] It must contain also evidence of an *immediate* departure.[6] It must contain the *jurat*, the omission of which is also fatal, with the arrest following.[7] It must state accurately the grounds upon

[1] *Van de Vyver* vs. *Deary*, 6 C. T., 466.

[2] *Roberts* vs. *Andrews and Tucker*, 3 M., 127.

[3] *Thompson* vs. *Andrews*, and *Norden* vs. *Oppenheim*, 3 M., 128 and 141.

[4] *Tets* vs. *Davis*, B. for 1879, p. 76.

[5] *Smith* vs. *David*, 1 M., 544.

[6] *Norden* vs. *Sunderland*, 3 M., 133.

[7] *Wilson* vs. *Golding*, decided in the Supreme Court in 1854, but not reported.

which the deponent founds his belief that the defendant is about to leave the Colony.[1] It must otherwise be good in itself, for, if bad, the writ will fall with it.[2]

The affidavit may be sworn to by one of several plaintiffs who has knowledge of the facts; or, in the case of a partnership, by a member of the firm on behalf of the firm.

The affidavit may be made also by the agent of the plaintiff, but if so, the information required must be within the knowledge of the agent himself.[3]

Where the plaintiff sues in his representative capacity as executor, or trustee, or agent, &c., it shall be sufficient if he states in the affidavit that the defendant is indebted to his principal, or to the estate he represents, in the sum he claims as shewn by the books in his custody, and that he verily believes the books to be correct.

If the party who has knowledge of the debt cannot, of his own knowledge, swear to the defendant's meditated flight, any person who has knowledge of it can make the affidavit; or there may be several affidavits, provided they are not made to run up unnecessary costs but only to supply what one or other of the deponents could not definitely swear to, and in order to comply fully and satisfactorily with the requirements of the 8th Rule of Court.

An affidavit intended for a Circuit Court arrest must be in the same form as one for the Supreme Court.[4]

If an affidavit is deficient in any one of the essential requisites hereinbefore mentioned, it will be void and be set aside with all the subsequent proceedings thereon; but of course there is nothing to prevent a proper affidavit from being filed, and to begin the proceedings *de novo* and re-arrest the defendant.[5]

Until the passing of Act 41 of 1882 there was no means of making an affidavit to arrest on information contained in a telegram, unconfirmed by any other direct evidence. But by virtue of the fourth paragraph of that Act, the 373rd

[1] *Dowse* vs. *Irvine & Co.*, and *Hutzer* vs. *Rogers*, 3 E.D.C., 184 and 400.

[2] *Spiegel* vs. *Eisenbach & Co.*, 1 J., 226.

[3] *Tets* vs. *Davis*, B. for 1879, p. 76.

[4] Rule 165.

[5] *Roberts* vs. *Tucker*, 3 M., 130.

Rule of Court as amended by the 380th was framed, and under that Rule the affidavit to arrest, if lodged with the Magistrate of the district where the plaintiff or his agent resides, must be telegraphed by that Magistrate to the Registrar of the Court, who upon receipt of such telegram can allow the writ to be issued by the plaintiff's attorney, while the Magistrate must, by the first post, forward the original affidavit.[1]

A plaintiff not fully complying with this Rule cannot have his telegram affidavit received in any other form, or through any other channel, as this Rule was framed specially to meet the case of an application under the 8th Rule.[2] Therefore an affidavit for an application for arrest not coming under the 8th Rule of Court cannot be telegraphed.

With the affidavit on which to found the arrest must be filed a warrant, or authority, of the plaintiff to his attorney to sue. If this is not done the process cannot issue.[3]

It is not necessary, though advisable, that the power should contain the name of the party against whom the writ is to be issued, as the affidavit identifies the party.[4] But the power should be signed by all the plaintiffs, and cannot be signed by one "for self and co-trustee."[5]

Of course any partner, having authority, can sign the firm's name. The power will, however, be void if signed by one partner in the name of the firm after the dissolution of the partnership, unless specially authorised thereto by the deed of dissolution.[6]

If the power is lodged with the Magistrate of the district in cases where it is required under the 373rd and 380th Rules, the Magistrate, in telegraphing the affidavit to the Registrar, should state also who is authorised in the power to issue the writ on plaintiff's behalf, and he must send the power, with the affidavit, by the first post.

Next in importance is the writ itself and the arrest, with

[1] As to arresting a debtor by telegram, see *infra*.

[2] *Jackson* vs. *Somerville*, 4 J., 158.

[3] *Gertenbach and Bellew* vs. *Mosenthal*, B., 1874, p. 85.

[4] *Roberts* vs. *Tucker*, 3 M., 130.

[5] *Trustees of Dodds, King & Co.* vs. *Watson*, 1 M., 140; *Western Province Mining Company* vs. *Thorpe*, 2 S., 246; *Walker & Co.* vs. *Beeton's Trustees*, B., 1868, p. 225, and 1869, p. 38.

[6] *Kilian and Stein* vs. *Norden, Executor of Horn*, 3 M., 530.

the proceedings thereon. The form of the writ (which in itself is of the least importance) is given in the 14th Rule of Court. The writ, which stands for a summons in the case,[1] should state the sum claimed, and for what, as in a summons; or it may state in concise terms generally the plaintiff's cause of action, as disclosed on the affidavit, without going into the details of the affidavit.

If, however, the arrest is founded on a liquid document, though it is not absolutely necessary to the validity of the writ that a claim for provisional sentence thereon should be made in the writ (as would be made in a summons in a provisional case), yet it is advisable that this should be done, as being more favourable to the plaintiff and causing no harm and less expense to the defendant, inasmuch as it will avoid further proceedings in case the defendant should not confess judgment on the return day of the writ.[2] The writ should be made returnable on some Court day which should not be further off than is absolutely necessary, especially when the defendant is known and can at once be arrested, or within a reasonable time before the return day, so as to give time to place the writ on the roll. Generally the return day is fixed, if possible, for a provisional day, or for the first Court day after the issue of a writ;[3] but a Circuit Court writ must be made returnable on the first day of the sitting of the ensuing Circuit Court.[4]

The taxed costs and charges preliminary to issuing the writ must be endorsed upon it by the Registrar, so that if the defendant wishes to settle the writ upon being arrested, he can at once know the amount. In addition to the costs endorsed on the writ, the defendant must pay the officer's caption fee of one pound, and also the necessary travelling expenses from any town or village,[5] and also a reasonable sum for any extra trouble and expense he may necessarily be put to in order to effect the arrest.

[1] *James* vs. *Webb*, B. for 1870, p. 37, and *Aldridge* vs. *Harcombe*, Ibid., p. 39.

[2] Van Alphen, 2, ch. 24 and 25; *Rothkugel* vs. *Gorman*, B. for 1870, p. 10; *James* vs. *Webb*, Ibid., p. 37; *Standen* vs. *Clarke*, B. for 1873, p. 27.

[3] Vroman, 1, 1, 25; Wassenaar, chap. 1, § 20; Grotius, Isagoge, 1, 5, 10; and *Dowse* vs. *Irvine & Co.*, 3 E.D.C., 184.

[4] Rule 167.

[5] Rule 341; *Wormald* vs. *Zarnikow*, 3 E.D.C., 360.

A writ of arrest intended to be returnable in the Supreme Court can be issued only out of the office of the Registrar of the Supreme Court. But a writ issued out of the Supreme Court may be made returnable in any of the lower Courts having jurisdiction in such matters; and if issued out of the E.D. Court, or High Court of Griqualand West, may be made returnable either in those Courts or in the Circuit Courts within their respective Provinces. But a writ issued out of the Circuit Court can be made returnable only in that particular Circuit Court, and not in any of the higher Courts. If issued in either of the three highest Courts here named, the writ must be signed by the respective Registrars thereof; if issued in a Circuit Court, it may be signed by any of the Registrars of the three highest Courts in their respective jurisdictions,[1] or by a Circuit Judge,[2] or by the Registrar of Circuit in such Courts,[3] or by the Resident Magistrate of the Circuit district.[4]

A writ of arrest which was headed in the E. D. Court, and signed by the Registrar of that Court, by order of one of the Judges of the Supreme Court, and made returnable in the Supreme Court, was confirmed by the latter Court on the sole ground that the writ was ordered by a Judge of the Supreme Court, and might have been issued also by the Registrar of the Supreme Court under the 8th Rule of Court on the necessary affidavits being filed with him, otherwise the E. D. Court, as such, has no jurisdiction to make a writ returnable in the Supreme Court, nor has the Griqualand West High Court.[5]

In issuing a writ of arrest out of the Circuit Court the Rules of the Supreme Court must be followed,[6] except that a Circuit Court writ must be made returnable on the first day of the sitting of the Circuit Court in which it shall be returnable, unless a Judge orders some other day;[7] and so also in moving for and obtaining the confirmation of a writ, and in moving for the dissolution of such a writ, the Supreme Court practice must be followed.

[1] Rule 379.
[2] Rule 164.
[3] Rule 162.
[4] Rule 164.
[5] *Fischer* vs. *Nielsen*, 3 J., 370; *Klippert* vs. *Nielsen* (the same case), E.D.C., 1; and *Hyman's Trustees* vs. *Randies*, 3 C. T., 221.
[6] Rule 165.
[7] Rule 167.

Immediately upon the receipt of the writ, and without delay, the Sheriff or his Deputy must execute it[1]; and if, through his neglect, or dilatoriness, or refusal, or without lawful cause or excuse, he fails to execute the writ within a reasonable time, and when he had, or might have, been in a position to arrest the defendant, he is liable to the plaintiff in an action for damages to the amount of the writ, and for costs and all other damages sustained thereby.[2] But a Sheriff's liability is personal, and is not transmitted to his successors.[3]

Any arrest, whether for security of a debt or to found jurisdiction, must be of the debtor in person, otherwise it will be void; it cannot thus be effected by leaving the writ at his house, or with someone there, as might be done with a summons.

A creditor may also personally arrest his debtor, and detain him, more especially if there is *periculum in morâ*, or danger that he would abscond and be out of the way before the writ of arrest could be properly issued and placed in the hands of the Sheriff for execution.[4]

Formerly there was no provision for the arrest of a debtor by telegram,[5] but this may now be effected. Upon the receipt of a writ by the Sheriff or his Deputy, he may telegraph to another Deputy stating that a writ has been lodged with him for the arrest of a person (giving name and address) to answer an action or other proceeding; and this telegram shall be sufficient authority to the Deputy to execute the writ for the arrest and detention of such person in this Colony until a sufficient time (not exceeding thirty days) has elapsed to allow the transmission of the writ to the place where the defendant has been arrested or detained, unless a Judge shall earlier discharge the defendant. But the Judge may also, upon good cause shewn, order the further detention of the defendant for a period of sixty days.[6] Of course, upon the

[1] Ord. 37 of 1828, § 7.

[2] G.P.B., Vol. 8, p. 770, § 27; Merula, 4, 24, 9; Bort, 6, 4; Peckius, Chap. 24; Voet, 2, 4, 27; *Smith* vs. *Pritchard*, 8 C.B., 565; *Smart* vs. *Hutton*, 8, Ad. and E., 568; consult also Atkinson's Sheriff, by Melsheimer, Ed. 6, Chaps. 5 and 7; and Churchill and Bruce's Sheriff Law, Chap. 6.

[3] *Davidson* vs. *Seymour*, Mood. and M., 34, note.

[4] Merula, 1, 8, 1, 11.

[5] *Silberbauer* vs. *Ruthven*, B. for 1868, p. 100.

[6] Act 41 of 1882, § 2.

arrival of the writ, a copy of it must be served on the defendant.

As to what constitutes an arrest of a person, it is not necessary that there should be a forcible attachment and detention of the person of the defendant, for as regards the mode of making the arrest, the slightest touch accompanied with a declaration of the object will suffice;[1] and it is not even necessary that the officer should touch the defendant, provided that the conduct of the parties shew that he is in custody; for instance, the officer may come into the room and lock the door.[2]

Immediately a person is arrested he should be informed of the object of the arrest, and the writ authorising the arrest should be exhibited to him, and a copy of it handed to him; but a copy of the affidavit need not be served,—this the defendant can always obtain upon applying to the Registrar.[3]

If the defendant escapes from a lawful arrest, he may be re-arrested at once, without a further order of Court, at any time and at any place, and in any way in which the Sheriff or his officer can best get hold of him; and his pursuers may for that purpose break doors, if necessary.[4]

But the Sheriff is not liable if, after arrest, the defendant escapes without his fault or connivance.[5] The Sheriff cannot command any bystander to assist him in the arrest; he can order only those duly appointed by him and sworn for that purpose.[6]

No one may resist or obstruct the Sheriff in an arrest, and if he does so he is liable civilly in damages, and even to criminal punishment;[7] and anyone who unlawfully releases one duly arrested is liable to the plaintiff in the real value of the claim in litigation, besides running the risk of the criminal consequences.[8]

The gaoler must use every precaution not to let the

[1] Merula, 4, 24, 9, 2.

[2] Smith on Actions, p. 318, 9th Ed.; and Chitty's Archbold's Practice, by Prentice, 9th Ed., Vol. 2, p. 701.

[3] Rule of Court 14, and *Silberbauer* vs. *Ruthven*, B. 1868, p. 100.

[4] *Re Wood*, decided Supreme Court, April, 1868, not reported.

[5] Ord. No. 37, § 4.

[6] G.P.B., Vol. 2, p. 1419.

[7] Peckius, 31; Bort, 6, 6; Stephen's Commentaries, Vol. 4, p. 306, 5th Ed.; and Chitty's Archbold's Practice, by Prentice, Vol. 1, p. 808, 9th Ed.

[8] Voet, 2, 7.

defendant escape from gaol; and if through his negligence the debtor escapes from gaol, he is liable to the plaintiff in an action for the damages sustained. The gaoler cannot release the defendant without a judgment of Court, or consent of parties.[1]

In England, if a person is arrested as *suspectus de fugâ*, or to find security, he is not to be lodged in the public gaol for twenty-four hours thereafter, in order to enable him to communicate with his friends with a view to obtain assistance from them; but he must nevertheless, during that time, remain in the custody of the Sheriff, and be detained in a safe and private place to be approved of by the Sheriff. If he is not making any *bonâ fide* communications with his friends, or attempt towards assistance, satisfactory to the Sheriff, or if he intimates, on his arrest, his inability to do so, the Sheriff must forthwith lodge him in gaol.[2] But with us no such privilege is allowed. The Sheriff, when once he has made an arrest, is bound to imprison; and if upon arrest he unnecessarily delays to lodge the defendant in gaol, he does so at his own risk, and is liable to the plaintiff in an action for damages to the amount of the plaintiff's claim in the suit. And he is not bound to listen to the plaintiff's request to delay the imprisonment after the arrest is made, but, if he does so, he is liable if the defendant escapes. But of course if, before the arrest is made, the plaintiff or his attorney requests a delay of the execution of the writ, this must be allowed. However, when once the arrest is made, the plaintiff is deprived of all control or say in the matter, except giving instructions as to the withdrawal of the writ. Arrests have sometimes been made in this Colony, and the defendant detained over night at an hotel or a friend's house, to enable him to arrange terms of settlement, but this has been upon the guarantee of the plaintiff to hold the Sheriff harmless from all loss, so long as reasonable care has been taken to secure the safety of the defendant.[3]

[1] G.P.B., Vol. 8, p. 770, § 27; Bort, 7, 47, 48, and 8, 30–32; Zutphen, Art. "Arrest;" see Chapter "*Civil Imprisonment.*"

[2] Chitty's Archbold's Practice, by Prentice, Vol. 1, Chap. 8, 6th Ed.

[3] Peckius, Chap. 24; Christinæus, Vol. 2, Dec. 150, n. 6; consult also Instr. v. d. Hoove, Art. 8, and Merula, 4, 2, 6.

When once the defendant is lawfully in gaol, he is to be maintained there, in the first instance, at the expense of the plaintiff; and generally he is there upon the same terms and conditions, and entitled to the same privileges, and liable to the same disadvantages, as are all judgment civil debtors; and if he escapes from thence, then the gaol authorities are liable also, just as in the case of judgment debtors; nor can he be discharged from gaol without authority of the Court or consent of the plaintiff.[1]

If the defendant upon being arrested should offer bail, it is for the Sheriff, or his Deputy, to decide whether or not he will accept it. He cannot, without good reason, refuse it. The *security offered must, however, be reasonable,* and must either be that of the defendant and another person having sufficient property within the Colony; or it may be any other security, so long as *it is reasonable and to the satisfaction of the Sheriff,* that the defendant shall appear according to the exigency of the writ, and shall stand to, abide by, and perform the judgment of the Court thereon, or render himself up to the prison of the Court in execution of such judgment.[2] The Sheriff ought also to *take security not only for the amount mentioned in the writ, and the costs and charges endorsed thereon, but also for £35 or £40, in addition thereto, towards the cost which the defendant may ultimately be adjudged to pay.*[3] The sum here mentioned cannot be laid down as a hard and fast rule. *The general rule of law is that the Sheriff should take besides sufficient security to secure the probable costs of the plaintiff in the action; and what this sum may be he must judge according to the nature of the case as disclosed on the writ.* If he claims too heavy a bail the Court can, in its discretion, reduce it;[4] and if he claims insufficient bail the Court may, on the same principle, increase it.

The surety or sureties to a bail bond, in order to be regarded as satisfactory to the Sheriff, must be domiciled in

[1] See Chapter "*Civil Imprisonment.*"

[2] § 7 of Ord. No. 37; and Rule of Court 14; consult also Voet, 2, 6, 1, and 10 and 11; Groenewegen, de Leg., 1, 4, 11.

[3] *Stoll* vs. *Brandt*, 3 M., 126; *Hoffman* vs. *Meyer and another*, B. for 1876, p. 42.

[4] *Aliwe* vs. *Hadie*, decided 1902, not reported.

this Colony, and therefore no foreigner or stranger can be a surety, however wealthy he may be, unless of course the plaintiff chooses to waive this rule; and in case of difference as to the stability of a surety, within the jurisdiction where the defendant is to appear, the Court must settle the question as to the sufficiency of the bail offered.[1]

In England the plaintiff must decide within four days whether he will accept the security offered by the defendant or not. With us it is the Sheriff, not the plaintiff, who is to be satisfied with the security offered;[2] and no date is fixed within which he is to decide thereon, but he must do so within a reasonable time.

If the defendant should pay the amount of the writ, with costs, and the costs of caption incurred thereon, then he is entitled to his immediate discharge from custody, and he is further also free from the arrest, and the arrest is at an end for ever. So also is he immediately discharged from the arrest, whether already in gaol or not, upon his giving satisfactory security to answer the action, and to fulfil the judgment, in terms of the bail bond in Rule 14.

If security is given to answer the action, and the defendant has entered appearance, there is no necessity for the plaintiff to move on the return day of the writ to have it confirmed;[3] but he may at once, on the defendant giving the security, go on with his action in the usual manner, in terms of the 330th Rule of Court, as if there were no arrest, and the writ then stands as his summons in the case. Formerly, if the defendant did not enter appearance the practice was that the writ need not be confirmed,[4] but now it must be confirmed,[5] although judgment can also be obtained at the same time.[6] If, however, the plaintiff does not go on in terms of Rules of Court 20 or 330, or the defendant does not move to have judgment signed against the plaintiff in terms of Rule of Court 25, then an arrest where bail has been given, if not

[1] Voet, 2, 8, 2–7.

[2] Rule of Court 14, and Ord. 37, 1857.

[3] *Ryan* vs. *Abrahams*, B. for 1873. p. 93, and *Loraine* vs. *Potter and Bellew*, 2 C. T., 110.

[4] *Wheelan* vs. *Elliott*, decided Supreme Court, August, 1875, not reported.

[5] *Loraine* vs. *Potter and Bellew*, 2 C. T., 110.

[6] *Erlank & Co.* vs. *Naude*, 3 C. T., 344.

proceeded with by the plaintiff within a year and a day (according to some writers a year and six weeks), is interrupted, and the sureties are released from their obligations, and the bail bond is thereby discharged.[1]

In the event of no security being given by the defendant, the plaintiff must wait till the return day of the writ, when he should move the Court for its confirmation,[2] and if the claim is a liquid one, and the writ contains a clause for provisional sentence thereon, together with the confirmation of the writ, judgment may at the same time be prayed for provisional sentence, and the defendant will, upon judgment being recorded against him, or if he succeeds in getting the writ set aside, be thereupon discharged from the arrest. If the writ contains no claim for provisional sentence, but the defendant nevertheless confesses judgment for the amount claimed in the writ, whether it be a liquid or an illiquid claim, he will in that case also be discharged from the arrest upon the judgment being given against him. But if the claim be not a liquid one, and the defendant does not confess judgment for the amount claimed in the writ, and if he declines or fails to give security to answer the action, and it becomes necessary for the plaintiff to proceed with his case, then on the return day of the writ the plaintiff will move for its confirmation, and unless the defendant successfully opposes the confirmation, he must go back to gaol till the case can be tried (for he must be produced in Court by the Sheriff[3] or be duly represented, on the application for the confirmation of the writ). But the Court will under such circumstances put the plaintiff on terms to plead within a fixed time and to go to trial by some specified day.

If the claim be a liquid one, but the writ contain no clause for provisional sentence, either because the debt is not yet due or because the claim has been omitted, the defendant may be specially sued for provisional sentence.[4]

Upon judgment being given on the trial day for or against

[1] Berg., Adv. Bk., Vol. 4, Con. 2; Van Zurck, Codex Batavus, Tit. "Arrest;" Merula, 4, 83.

[2] *James* vs. *Webb;* and *Aldridge* vs. *Harcombe*, B., 1870, pp. 37, 39.

[3] *Aldridge* vs. *Harcombe*, B., 1870, p. 39.

[4] *Drysdale* vs. *McLelland*, decided June, 1890, not reported.

the defendant, he is entitled to his discharge from prison on the arrest.[1]

But this discharge from prison, on judgment being given against him, does not free the defendant from the debt or from further imprisonment.[2] If he does not give security on being arrested, his imprisonment is only till judgment is given. If he fails to satisfy the judgment on a writ of execution, he can be sued for civil imprisonment on the judgment. But if he should again meditate flight before a decree of civil imprisonment can be obtained against him, he can be re-arrested, not under the 8th Rule of Court, but only by an order of the Court or of a Judge; and if the decree of civil imprisonment has been already obtained, he may be arrested by virtue of that decree.[3]

While, with us, on the confirmation of the writ, when the defendant does not give bail he goes back to gaol, and the plaintiff is put on terms to bring his action at once, in England the defendant may be detained in gaol for not more than six months before the action need be decided:[4] but there as well as here the defendant cannot be detained in prison on the writ of arrest after the final judgment in the case has been given.[5]

The defendant has to enter into a bail bond, in order, as its terms state, "*to stand to, abide, and perform the judgment of the Court thereon, or render himself to the prison of the Court in execution thereof.*" Those who become surety for the defendant should therefore see that he carries out the judgment; or, failing it, that he is present and prepared to go to gaol in execution thereof. If the defendant then fails to satisfy the judgment, and he is not at hand to surrender himself to prison, when required, in satisfaction of the judgment, the sureties under the bond must pay to the plaintiff the amount of the judgment and costs.

On paying the plaintiff, they have of course their redress

[1] Wassenaar, 1, 16, 46; *James* vs. *Webb*, and *Aldridge* vs. *Harcombe*, B. for 1870, pp. 37 and 39; *Standen* vs. *Clarke*, and *Ryan* vs. *Abrahams*, B. for 1873, pp. 27 and 93; *Fischer* vs. *Nielsen*, 3 J., 370; and *Robertson* vs. *Wilkinson*, B. for 1877, p. 43.

[2] Sande, 1, 17, 2.

[3] See Chapter "*Civil Imprisonment.*"

[4] 32 and 33 Vict., c. 62.

[5] *Home* vs. *Druyff*, L. R., 8, Ex. 214.

against the defendant wherever he may be; and this redress must be by action, and not by notice of motion.[1]

A writ may be set aside, with all the proceedings prior and subsequent to the arrest, for non-compliance with any one of the grounds already mentioned as to the requirements of the affidavit on which the writ is founded, or the power to sue; and also with respect to any of the other grounds which appear in this Chapter, and also as to those persons or goods that are privileged from arrest, whether temporarily or permanently, or at certain times, or on certain occasions, or at or in certain places.

A writ of arrest may be discharged also when issued by a person not an attorney.[2] And an arrest may be dissolved, and the bail bond discharged, if it is not certain by whom the debt is due.[3] It would be set aside also if the Court is of opinion that the alleged cause of debt has not satisfactorily been established;[4] also if at the time of the arrest the Sheriff or his officer has not a copy of the writ in his possession to be handed to the defendant;[5] also when it is oppressive, or the claim of the plaintiff is monstrous or frivolous, and if he is not likely in an unliquidated claim for damages to have £50 awarded to him;[6] also for any informality in the affidavit on which the arrest is founded, or in the power to sue; or if it does not in every respect strictly comply with the 8th and 14th Rules of Court;[7] also when the person is exempt from arrest; or the grounds upon which the person or the goods are arrested are not for arrestable causes; also if the defendant can clearly prove he did not intend to leave the country, &c. A writ must moreover stand or fall with the original affidavit on which it has been granted or issued.[8]

But a writ will not be set aside because it does not contain the alleged defamatory words, or their substance, in an action for libel or slander, of which the plaintiff complains;[9] nor is

[1] Consult also *Ogilvie* vs. *Norton*, 2 M., 79; and *Hoffman* vs. *Meyer and another*, B., 1876, p. 42.

[2] *Smith* vs. *David*, 1 M., 544, and Rule of Court 8.

[3] *Roberts* vs. *Andrews and Tucker*, 3 M., 127.

[4] *Silberbauer* vs. *Ruthven*, B. for 1868, p. 100.

[5] Ibid.

[6] *Roberts* vs. *Tucker*, 3 M., 130; and *Saget* vs. *Bataillou*, B. 1868, p. 32.

[7] *Smith* vs. *David*, 1 M., 544.

[8] *Spiegel* vs. *Eisenbach*, 1 J., 226.

[9] *Norden* vs. *Oppenheim*, 3 M., 140.

a person arrested entitled to be released from prison by the mere fact of the surrender of his estate; but it is in the discretion of the Court to release him or not.[1]

In setting aside a writ of arrest, the costs, though as a rule in the discretion of the Court, usually follow the judgment; and the setting aside of an arrest sets aside also the bail bond and the subsequent proceedings thereon.

On the return day of the writ, if no bail has been given, the defendant may oppose the confirmation of the arrest; but if he wishes to move for the discharge of the writ, he need not wait till the return day thereof, but may *anticipate* the day of appearance.[2]

For whatever cause a writ or arrest may be opposed or discharged on the return day thereof, it may also be set aside by *anticipation*. If, on being arrested, the defendant conceives that he has good legal grounds to have the writ set aside, for any of the causes mentioned in this Chapter, he need not wait till the return day thereof to oppose the application for confirmation of the writ, when made, but he may "anticipate" the day of hearing, and apply to the Court in term time, or to a Judge in vacation, for the dissolution of the arrest, upon giving twenty-four hours' notice thereof, and by setting forth in the notice of motion the grounds or reasons upon which he moves the Court to have the writ dissolved.[3] In the case of *Hillman*, here quoted, the Court furthermore held that the twenty-four hours' previous notice, under the 135th Rule, is imperative. The motion is to have the writ set aside; and this, in practice, generally embraces all the proceedings preliminary, attendant on, and subsequent to the arrest; and when the arrest is dissolved, the bail bond is also thereby discharged.[4]

"*Anticipation*," in its legal sense, is used in all cases where there is *periculum in morâ;* that is, where the case demands immediate attention, such as in matrimonial causes, or in the case of perishable goods. But particularly is it used in the case of a civil arrest, when either the day of hearing is too far

[1] §§ 22 and 23 of the Insolvent Ordinance; and *De La Cornillière*, decided 30th Oct., 1867, not reported.

[2] Grotius, Isagoge, 1, 5, 10.

[3] Rule of Court 135; and *re Hillman*, 4 J., 334.

[4] *Roberts* vs. *Andrews and Tucker*, 3 M., 127; *Saget* vs. *Bataillou*, B. 1868, p. 32.

off, or the defendant has good grounds for having the arrest set aside, in which case it would be manifestly unjust to detain him unnecessarily in prison ; he is therefore allowed to "anticipate," or to shorten, the day of hearing, before the usually appointed time mentioned in the writ, by giving the notice here stated.[1]

The return day may also be anticipated under a Circuit Court arrest, and an arrest made under a Circuit Court process may be set aside by a Judge of the Supreme Court, as the 135th Rule of Court extends also to the arrests under the Circuit Court process ; so also may such an arrest be set aside by the Supreme Court, or by the E. D. Court, within the area of its jurisdiction. The 166th Rule of Court does not prevent such an application to the Supreme Court.[2]

But a person cannot move for the discharge of a writ by "anticipation" on the ground that his estate has been sequestrated since the issue of the writ ; and he cannot, after sequestration, confess judgment in terms of the writ, as by the sequestration he is divested of his estate, and has no power to confess. He can, under such circumstances, apply for his discharge from the arrest only under §§ 22 and 23 of the Insolvent Ordinance, and this application he may make even when the plaintiff moves for the confirmation of the writ.[3]

If an arrest is void merely on the ground of informality in any of the proceedings, and where the plaintiff might begin *de novo*, he (the plaintiff) is not liable for anything beyond the defendant's costs in upsetting the proceedings. But where an arrest is otherwise illegal, and should never have been made, whether because the defendant is privileged from arrest, or the cause is not an arrestable one, or there are not sufficient grounds for an arrest, or in a criminal case, where it is either purely malicious, or wanting in a reasonable and probable cause, the defendant has, in any of these cases, an action for damages against the plaintiff for all loss and injury sustained thereby. In addition thereto, the arrested party has also an action for damages against the Sheriff or other

[1] Instr. v. d. Hooge Raade, Art. 215, 230 and 231 ; Instr. van het Hof., Art. 207 ; and G.P.B., Vol. 2, p. 784, § 26, and p. 803, § 96 ; Bort, 6, 27 ; Merula, 4, 3, 5 ; De Papegaai, 1, 22.

[2] *Harsant* vs. *Olssen*, 2 A., 108.

[3] *Re Davidson*, 5 J., 93 ; and *Hill and Paddon* vs. *Davidson*, 5 J., 99.

officer arresting him, if he is the wrong party arrested, and mistaken for the defendant in the suit. The measure of damages in all such cases is in the discretion of the Court, and no hard and fast rule can be laid down thereon. But it may be mentioned that when a man is falsely arrested for a cause charging him with an act which is also punishable by the criminal law, he generally gets heavier damages awarded to him than if the matter were purely a civil one.[1]

A lawful arrest has generally the following legal consequences :—

(*a*) It induces *litis pendentis.*[2]

(*b*) It prevents prescription.[3]

(*c*) It gives no preference in case of the insolvency of the defendant, except for costs of the arrest.[4]

(*d*) It founds jurisdiction.

(*e*) It conserves the thing or the debt.

(*f*) It is a species of execution.

(*g*) It secures the attendance of the defendant at the trial; or secures the debt, in case he should fail to comply with the terms of the judgment or surrender himself accordingly.

PERSONS WHO CAN BE ARRESTED.—To mention who cannot be arrested would still leave the matter in doubt, and I therefore purpose giving various instances of persons who may be arrested, with the reasons assigned for their arrest.

(*a*) A *Foreigner*, or a person who comes from a foreign jurisdiction to transact business with you, who leaves without settling a debt contracted with you; for though you may know that he comes from another country, you may infer that he means to pay.

(*b*) A *Debtor*, though the debt is *not yet due*, because it may be unjust to the creditor to delay if the debtor is *suspectus de fugâ;* so also a debtor who makes a debt

[1] Peckius, Chaps. 17 and 18; Gail. de arres., Chap. 13, 5, and Chap. 17; Hol. Cons. Vol. 6, Con. 164; *Cloete* vs. *Bergh*, 3 M., 109; *Jacob* vs. *Evans*, B. 1869, p. 29; and *Morens* vs. *Milner*, 1 E.D.C., 145; *Rigg* vs. *Roper and Jackson*, 4 J., 141; *Langerman* vs. *Connell and others*, 7 J., 342.

[2] Bort, 7, 1, 2.

[3] Bort, 7, 3, and Voet 2, 4, 63.

[4] Bort, 7, 15, 16, 17; De Academie 26, 366; and Van Leeuwen, 5, 7, 2, and Voet 2, 4, 64.

conditionally;[1] also one of co-debtors can arrest the other for his *pro rata* share where they are jointly liable in the same debt.

(*c*) A person who has undertaken not only *to give*, but also *to do something;* for instance, one who has undertaken to make glass for another may be arrested to complete the work, or to indemnify him.[2]

(*d*) A person who is accused of slander or libel, or of any injury or damage caused, whether to a person or to a thing.

(*e*) An *Executor* of an estate, to account for his administration of that estate; for in the person of an executor the ownership of the debt is not altered, but he is liable, not in his private capacity, but in his capacity as executor. So also every other person who acts in a *representative capacity*, to account for what he has done in that capacity; as a trustee of an insolvent estate, an agent in regard to his principal, a guardian for debts contracted by him, &c., &c.[3]

(*f*) A *Woman* for her own debts, but not for those of her husband, unless she is a public trader, or they trade publicly together, or unless she makes his debt her own, and whether she has renounced any exceptions or benefits, or not;[4] and though she is not a public trader, yet if she contracts a debt beyond the place of her domicile, and in the absence of her husband, she may be arrested.[5]

(*g*) A *Husband*, married in community of property, for the debts of his wife, contracted by her before as well as during the marriage.[6]

(*h*) A plaintiff or a defendant may arrest each other, in a pending cause, and so long as the judgment is not yet satisfied.[7]

(*i*) A duly authorised agent cannot be arrested for any-

[1] Neostadius, Cur. Holl., dec. 20; Sande, 4, 4, def. 7 and 13; Hol. Cons., Vol. 4, Con. 191, n. 6; Academie, Chap. 26; Voet, by Buchanan, 2, 4, 20.

[2] Peckius, 4, 7.

[3] Peckius, 4, 12 and 13; Voet, 2, 4, 37.

[4] For the origin of this law, see the Placaat of Chas. V., of the 4th of October, 1540, G.P.B., Vol. 1, p. 314, § 2; Loenius, 126; Neostad., Dec. 57; Sande, 2, 4, 4; Bort, Chap. 4, § 30. See also Chapter "*Civil Imprisonment.*"

[5] Voet, 2, 4, 36.

[6] Voet, by Buchanan, 2, 4, 36, and see Chapter "*Civil Imprisonment.*"

[7] Peckius, 4, 16.

thing *bonâ fide* done in the name of his principal, in which case the principal only would be bound and can be arrested; but a person who *malâ fide* gives himself out as an agent of another, and enters into an agreement with a third party, may be arrested by that party for whatever he undertook to do, but failed. But factors, brokers, and clerks may be arrested to account to their principals for what they have done.[1]

(*j*) Every *Surety*, whether a woman or not, and whether the usual legal exceptions as to sureties have been renounced or not by men; but as to a woman she must have renounced the *senatus consultum vellejanum* exception in all cases of suretyship, except that it is not now necessary to be renounced when she signs or endorses promissory notes or bills of exchange.[2] But the Court, however, will not extend this benefit except to cases where clearly applicable.[3] And one of co-sureties can arrest the other for his *pro rata* share when they are jointly liable; and so also can a co-surety arrest the debtor whether he has paid the creditor and received cession of action, or whether he is afraid that the debtor may abscond before the creditor can be aware of it.[4]

(*k*) A *Notary* may be arrested to produce certain documents in his custody, executed before him as notary; and so also may any other person, to give evidence and to produce papers in his possession.[5] But though this is still law, such an order is not likely to be given by a Judge at the present day, so long as there is a chance of obtaining the documents and the testimony of the witness by means of a commission *de bene esse*. If, however, the commission cannot be obtained, or the witness declines to attend it, or keeps out of the way, then there is no alternative but to arrest him.

(*l*) A person guilty of contempt of Court.

(*m*) An *Insolvent*, if he intends to leave the Colony without the consent of his trustee or creditors, before his

[1] Peckius, 4, 12 and 13.

[2] See Bills of Exchange Act, No. 19 of 1893.

[3] Peckius, 5, 14; Schorer, 1, 5, 23, and 3, 3, 18; *Smuts, Louw & Co. vs. Coetzee*, B. for 1876, p. 55; *Whitnall vs. Goldschmidt*, 3 E.D.C., 314; *Le Roux* vs. *Brink's Executors*, 4 J., 74.

[4] Peckius, de Jur. Sist. by Van Leeuwen, 4, 9; Vroman, 1, 1, 25; Bellum Juridicum, Cas. 16 and 79.

[5] Peckius, 4, 15.

estate is finally liquidated, and before he is rehabilitated,[1] or even before a trustee is appointed.[2]

(*n*) *Students*, in Holland, could not be arrested but before their own forum. By an enactment in force in Holland, the Universities there had a forum before which causes affecting students were tried. The students of those Universities could therefore not be summoned before any other but their University Court. A similar rule holds good in the Universities of Oxford and Cambridge, where the cases of undergraduates are tried in the Vice-Chancellor's Court.[3] A few years ago this privilege was done away with in Holland, and students of those Universities may now be summoned before and arrested by the ordinary tribunals. But this privilege of students, being purely a local enactment for Holland, never extended to any of the Colonies, and thus was never in force here.

(*o*) The *Captain of a ship*, for all obligations entered into by him for, or on behalf of, the ship. For in this respect he has an authority implied by law as agent to bind the owner or charterer. The creditors may sue the owner, or the Captain, at their option; but the owner may be out of the jurisdiction, in which case it is easier to sue or arrest the Captain.[4] By the arrest of the Captain, as such, the ship cannot leave the port without him.

(*p*) A person is not privileged from arrest whilst returning from lawful custody.[5]

(*q*) A minor cannot be arrested for those debts contracted by him for which he is not, as a minor, legally liable; but for any legal liability, such as for necessaries of life supplied to him, he may be arrested.

(*r*) Members of our Parliament.

(*s*) Consuls.[6]

(*t*) Clergymen.

[1] Insol. Ord., §§ 95, 124 and 125; *Still* vs. *Gilbert*, 3 M., 124, and *De La Cornillière*, decided 1867, not reported.

[2] *Levin* vs. *Cortis*, September, 1892, not reported; see also *Heydenrych* vs. *Lynch*, 6 C. T., 50.

[3] Cf. the "Spinning House" Case, at Cambridge, tried in 1892 (*re* Hopkins, 66 L. T. 53).

[4] Dig. 14, 1, 1, 25; Roscoe's Admiralty Law and Practice, pp. 46–47.

[5] Chitty's Archbold's Practice, by Prentice, 12th Ed., Vol. I., p. 785.

[6] *Hollis* vs. *Chase*, 8 J., 3.

PERSONS WHO EITHER CANNOT BE ARRESTED AT ALL, OR WHO ARE TEMPORARILY PRIVILEGED FROM ARREST.—The general rule is that everyone can be arrested for a lawful cause, but the following are excepted, and are privileged from arrest :—

(*a*) The members of the Royal Family.[1]

(*b*) The Servants of the King.

(*c*) Peers and Peeresses.

(*d*) Members of Parliament in England cannot be arrested there during the sitting of a Parliament, nor for 40 days before or 40 days after the session ;[2] and in Holland the Deputies of Cities when summoned for business by the States of Holland, and the Deputies to the Assembly of their High Mightinesses in Holland during the sittings or on their way to or from them.[3] But this privilege of members of the English and of the Dutch Parliaments is not in force in this Colony. The enactments in England and Holland on this subject, being so purely local, do not extend to their Colonies, and can be introduced into the Colonies only by Special Act of Parliament, and this has not been done for this Colony. But apart from this privilege being only territorial in England and Holland, it is one of the constitutional principles of Great Britain that a Colony acquired by conquest or cession (as this Colony was) remains subject to its own pre-existing laws, and is not affected by statutes of the United Kingdom passed before its acquisition.[4] Now the pre-existing law of this Colony at the time of its cession to England was the law of Holland, and the Parliamentary privileges of Holland, as already stated, are applicable only to the Legislature of Holland, and do not extend to her Colonies. On the establishment of a Parliament in this Colony, in 1850, by Letters Patent from the Crown, the privilege of freedom from arrest was not introduced, though by a series of local rules the greater part of the procedure of the British Parliament has been adopted.

[1] Chitty's Archbold's Practice, by Prentice, 12th Ed., Vol. I., Chap. 6.

[2] Stephen's Comm., Vol. II., p. 356, Ed. 5.

[3] Placaaten of 4th October, 1588; 27th July, 1635; and 27th July, 1653, G.P.B., Vol. VII., pp. 54 and 55.

[4] Stephen's Commentaries on the Laws of England, Ed. 5, pp. 103–108.

In the cases of the Sovereign and his servants and of peers and ambassadors, the privilege of freedom from arrest is accorded by the law of nations, and is therefore of universal application.[1]

(*e*) *Ambassadors, Plenipotentiaries*, or other *Public Ministers of Foreign Powers or States*, and their servants and goods, such as they require while holding their high position, whether in going to or coming from the place appointed, or while resident there; because, as such, they are considered to represent their sovereign. The servants of ambassadors who are privileged from arrest must, however, actually be in the service, at the foreign Court, of the ambassadors.

If an ambassador will not pay his debts while abroad in the service of his State, he is to be recalled home; and if his sovereign will not pay his debts, it is a just cause for a declaration of war, and the money is to be collected *vi et armis*.[2] There is nothing, however, to prevent the ambassador being sued before *his own* Court, if the plaintiff is in a position and willing to do so.[3]

In the reign of Queen Anne of England there was a Statute passed[4] which not only makes all process against ambassadors null and void, but renders it a crime to arrest them. This Act was passed to pacify Peter the Great of Russia, Czar of Moscow, whose ambassador was arrested in London, in his own coach, for a debt of £50. The Czar resented this affront very highly, and demanded that the Sheriff, the plaintiff, and the plaintiff's attorney should be hanged for making the arrest (!); and when the British Government refused to do so, he threatened to make war on Great Britain. In consequence of this threat the British Parliament unanimously passed the said Act, which humiliating step was accepted by the Czar as a full satisfaction.[5]

In the case of the Marquis of Albeville, when English

[1] Consult Maxwell on Statutes, Chapters 3 and 6.

[2] Grotius de Jur. Bel. et Pac., 2, 18, n. 8 and 9.

[3] Placaat v. Haare Hoog. Mog. 9th Sept., 1679, G.P.B., Vol. III., p. 310; Merula 4, 40, 3, 14; Voet 2, 4, 43 and 44; Loenius 82; De Papegaai 1, 298; Stephen's Commentaries of the Laws of England, Vol. II., Ed. 5, pp. 506–512; Jud. Prac., 2, 18, 2; Bort, Chap. 4, §§ 6 and 18.

[4] 7th Anne, Chap. 12.

[5] Stephen's Commentaries, Vol. II., pp. 506–512.

Envoy in Holland in 1688, he renounced his privilege of freedom from arrest, and was arrested. But it is questionable whether even then he could legally do so.[1] Anyhow, reasoning from general principles, he could not, and certainly would at the present day not be allowed to do so.

(*f*) *Members of Convocation* whilst engaged in business, or going to or coming from it.[2] But this is in force only in the United Kingdom, and not here.

(*g*) *Soldiers* or other *military persons* while on the march to war, or actually and *bonâ fide* on duty at the time, or who have been duly called out to war; nor their weapons, cattle, horses, or accoutrements. This applies also to burghers on active service,[3] and to a soldier in the British Army whose debt does not exceed £30.[4] But this does not apply to a debt contracted by a soldier before he enlisted or joined the regiment, nor when he is *suspectus de fugâ* and has joined the regiment with that object.[5] But the military accoutrements, if belonging to the State, cannot be arrested for the private debts of a military person; and when a military person is not on the march with his regiment, he may be arrested for debts contracted even after his enlistment. For any misdemeanour which a soldier may be guilty of and for which he is liable to be punished by the Civil Courts, he may afterwards be punished also by the Military Courts, whatever that form of punishment may from time to time be.[6] The same privileges and disabilities here mentioned apply also to the naval service.

(*h*) *Victuallers* or other parties while actually engaged in conveying the necessary provisions to the army, or while returning home from such duty.[7]

(*i*) Persons connected with a case, such as the parties to a suit, their witnesses, counsel and attorneys, are privileged from arrest while attending at Court for the purposes of that case, and also whilst going to and returning from the Court, and till they are at home again, *eundo, morando, et redeundo.*

[1] Van Zurck, Codex Batavus, Tit. "Arrest."
[2] 8th Henry VI., c. 1.
[3] *Casson* vs. *Connolly*, 1 J., 68.
[4] See Chapter "*Civil Imprisonment.*"
[5] Bort, Chap. 4, § 27.
[6] Sande 1, 1, 4; Bellum Juridicum, Case 62.
[7] Placaaten of 19th May, 1544, and 5th August, 1544.

A convenient and reasonable time must be allowed to the parties to get home after the trial is over.[1] But a witness is not privileged if he attends of his own accord, and without being subpœnaed.[2]

(*j*) The *Governor* and the *Judges*, without a special order of the Supreme Court.[3]

(*k*) A *Woman*, for the debts of her husband; but she is not privileged from arrest for her own debts, or for their joint debts.[4]

(*l*) *Two foreigners*, belonging to the same jurisdiction, cannot arrest each other, nor each other's goods, in a foreign jurisdiction for a debt contracted in their own jurisdiction, but they may if they are from different jurisdictions.[5] But a contract made in a country where the law does not allow a personal arrest may, however, if it is to be operative in another country, be enforced by personal arrest in that other country whose laws authorise such a mode of proceeding as part of the local remedy.[6] But when a contract has been made in one country, to be carried out in another country, one party cannot arrest the other or his goods in an intermediate country where neither party is domiciled; nor, where a contract has been entered into, and is payable, in the country of the defendant, can he be arrested if he passes through the country of the plaintiff.[7]

(*m*) A *Debtor* at the place to which he had been invited by his creditor to meet him, in order to come to a settlement with him; for this would be contrary to good faith.[8]

(*n*) A *Clergyman* whilst performing divine service, or whilst going to church for that purpose and returning from thence.[9]

(*o*) The *debtor of your debtor*, unless your debtor has ceded

[1] Voet 2, 4, §§ 39 and 40; Pulling's Law of Attorneys, 3rd Ed., pp. 397 and 398; Chitty's Practice, by Prentice, 12th Ed., Vol. I., Chap. 6; Stephen's Commentaries, 5th Ed., Vol. III., pp. 388 and 632; *Richardson* vs. *Nisbet and Dickson and the Sheriff*, 3 M., 123.

[2] *Roberts* vs. *Tucker*, 3 M., 130.

[3] Rule of Court 9.

[4] Neostadius, Dec. 57, and Sande 2, 4, 4.

[5] *Wallace* vs. *Hill and Scheneman*, and *Hansloo* vs. *Fotheringham*, 1 M., 347 and 352; and *Wilhelm* vs. *Francis*, B. for 1876, pp. 164 and 216; *Dymott* vs. *Pike*, 2 G., 55.

[6] Story's Conflict of Laws, §§ 568–572.

[7] *Einwald* vs. *The German West African Company*, 5 J., 86; and *McLeod* vs. *Benjamin*, 2 C. T., p. 119.

[8] Peckius, Chap. 7.

[9] Peckius, 4, 14.

his debt to you; but you may arrest the debt or money he owes your debtor.[1]

(*p*) A debtor whose debt does not amount to £15.[2]

(*q*) A *Guardian* for the debts contracted by his ward without his consent; but he may be arrested for the debts contracted by him in his representative capacity.[3]

(*r*) A person who can successfully set up the defence of *litis pendentis;* for an arrest cannot be made in a matter or question about which formal judicial proceedings are pending elsewhere, unless the party is *suspectus de fugâ,* and then it may only be to give security to satisfy the judgment.

(*s*) A *Father* who goes to visit his son who is in a dying state; nor whilst he attends that son's funeral.[4]

WHERE AN ARREST CAN BE MADE AND WHERE NOT.—Under this heading, differing from the previous ones, by giving one general rule and all the exceptions I shall make the subject at once fully comprehended by the young student.

As a general rule, then, an arrest can be made everywhere and at all places, even on the public road, or in places of worship, if the fear of escape should need it; but to this there are the following exceptions:—

(*a*) In a *public school* during school hours; because it is presumed to have an injurious effect upon the pupils.

(*b*) In a *Court of Law* during the hearing of a case, or during its usual legal proceedings.

(*c*) In a *ship* which serves as a dwelling; for in this respect a ship is regarded in the same light as a dwelling house; but this privilege does not apply to those persons who are only temporary lodgers or travellers in the ship, nor if the ship is ready to sail to a foreign port.

(*d*) In *Churches,* during divine service. In the olden days arrests were not allowed to be made in churches, or cloisters, or other holy places, but on account of the abuse made by

[1] Peckius 4, 11, and Sande 1, 17, 1.
[2] Rule 8.
[3] Coren, Obs. 3, No. 18; Huber Hed. Regts., Vol. II., Bk. 1, Chap. 32, § 4; V. d. Linden, Form v. Proc., Tit. 25, § 9.
[4] Utrechtse Consultatien, Vol. II., Con. 141.

persons who resorted thither as places of refuge, this privilege fell into disuse, and it is now limited only to churches, and then only during divine service.

(*e*) In a *Church-yard*, during *bonâ fide* attendance at a funeral.

(*f*) Two inhabitants of the same territory cannot arrest each other's goods in another territory.[1]

(*g*) In *one's own house.* As this part of the subject is of vast and universal importance, and is the one most frequently called in question, I shall treat of it a little more fully than of the others.

A person cannot be arrested in his own house against his will, nor in the house of another person against the will of that person. Anyone so arrested is to be immediately released, and he is free from a re-arrest at the suit of the same person till he shall have reached his house again; but he is liable to be arrested at the suit of another person before he has reached home. The term "house" here signifies one that is used as a dwelling house, and it makes no difference whether you have absolute dominion in it, or have only hired it, or live in it free. It is not necessary that the house should have been originally built as, or subsequently specially converted into, a dwelling house; it is sufficient for the purpose of the benefit of this privilege that it is used as a dwelling house, or at any rate the part which he inhabits. The size, splendour, and magnificence of the building make no difference; nor the circumstances, taste and means of the owner. Nor does it matter whether the house is inhabited by the poorest of the poor, or in fact what kind of house it is, tent, covering, or shed, provided it is used as a dwelling. Thus the most humble and insignificant hut, if used as a dwelling, frees a person from arrest therein; and so also if part of a stable or mill is occupied by anyone as a dwelling, he cannot be arrested in those parts, though he is liable to be arrested if found in other parts used for other purposes. But if access to the other parts of the building cannot be had except through the part used as a dwelling, he will be freed from arrest in those parts also. For example (as is frequently the case

[1] Voet 2, 4, 45.

in this Colony), if a person has a shop, or a bottle store, or a canteen, or a drinking-bar, which is on the same foundation as, or forms part of, the same house, and to and from which he can go only through the parts of the house used as a dwelling; or if there is no means of access to the house but through the canteen or shop, &c., it must be looked upon as part of the dwelling house, and he cannot be arrested in it. But, on the other hand, if there be a separate door to the canteen or shop, leading to the street, and through which access and egress can be and is usually had, especially by the public, then, though there be a door connecting it with the part used as a dwelling, he is not freed from arrest in it. When, therefore, the law says that a person is free from arrest in his own house, it means as a general rule the house (or parts thereof) which he uses as a dwelling, and not the house (or parts thereof) which he uses for other purposes besides.

In the term "dwelling house" something more is sometimes included than the single building which is inhabited by a person; and this depends upon all the circumstances of habitation. For instance, if adjoining, or within close proximity to the dwelling, there are certain necessary outbuildings or outhouses, *bonâ fide* belonging to, and used as part and parcel of, and in connection with the dwelling house, he is free from arrest in all these buildings also. To ascertain this, it is sometimes necessary to take into consideration the habits and customs, and mode of life, taste, occupation, rank, pecuniary means, and all surrounding circumstances of the occupier of the dwelling house. If, according to his rank, means and habits, he *bonâ fide* requires and uses all these outbuildings in connection with the free and comfortable, though it may be luxurious, habitation of the dwelling house, and without which the dwelling house, for his purposes, would be uncomfortable and incomplete, they would be included in the term "dwelling house." On the other hand, if a poor person, whose means or whose habits or social position do not warrant it, does not use these outbuildings as part and parcel of the comfortable habitation of the dwelling house, then they are excluded from the terms "dwelling house." But these outhouses, &c., must belong to the dwelling house, and be

in the same grounds as the dwelling; or at any rate there must be no dividing ground, or public road, or street between any of them, and all the intermediate spaces must also belong to the dwelling house. Thus, a stable, coach-house, forage-room, wood- or coal-house, w.c., bath-room, scullery, pantry, billiard- or smoking-room, yard, lavatories, fowl-house, servants'-room, dancing-room, conservatory, &c., and such other necessary outbuildings as can be said to belong to, and form part of, and which are used in connection with, the comfortable occupation of the dwelling house, as such, all come under the term "dwelling house," and a person is protected therein from arrest; as also is he protected in, or on, all the intermediate spaces leading from one to the other building or rooms, &c. And in addition to these, on an agricultural farm, under the term "dwelling house," are included the cellars, barns or other buildings necessarily used for the storage of the produce of the farm, in all of which one is protected from arrest. Also being on the terrace or stoep of the dwelling, whether urban or rural, or on the necessary space belonging to and surrounding it; or in the precincts of the house (or, as the English law happily puts it, the "curtilages" of the house) protect one from an arrest. But in a public road through his farm, or to his house, or on a public pavement in a street, in front of his door, a man is not free from arrest. So also is one protected from arrest in the garden belonging to the dwelling, and where access to and egress from the house cannot be had but through this garden: but not in a garden away from the dwelling, or through which one need not necessarily go, and through which the public do not usually go to get into or out of the dwelling house. The enclosing or fencing of a whole farm, or all the lands surrounding the dwelling, and the cultivation thereof, do not come under the term garden, which must be taken in its usual and ordinary sense.

Van Leeuwen, in his translation of Peckius, left out a most important passage in the 3rd Section of the 6th Chapter. After speaking of the freedom from arrest in a person's house, &c., Peckius goes on to say (and these are the omitted words), "*et in horto ad quem ex domo aditus est.*" The reason why

a person is free from arrest in a garden through which access is had to the dwelling is not anywhere stated by any of the writers, but we can only conjecture that it is because, in ancient days, most dwellings, and particularly in Rome, were surrounded by walls, within which there was a garden, or the whole space within was kept as a garden, and no approach could be had to the dwelling house except by the one gate, which was sometimes, especially at night, locked.

A person is not privileged from arrest on any other cultivated ground than the necessary garden here mentioned, or in a theatre or circus or other public place of amusement, though leased by him, or in his club, or in a guard-room, or at the public baths; because all these places are made as places for amusement or profit, and not made as places for refuge, or to serve as a protection, as dwelling houses are. Nor does the fact of his being in an hotel, or in a boarding-house, free him from arrest, unless he is owner of the place, and lives there with his family; or, in the case of a boarding-house, unless he has hired a room there for at least a year. Nor is he free from arrest in cellars, barns (except in the case of an agricultural farm), store-houses, shops, offices, &c., which form no part of the dwelling house.

But whenever a person is suspectus de fugâ, *no matter where he lives, or for debts due to the Public Treasury, he is not free from arrest in his own house.*[1] In the following case some of the points above-mentioned have been discussed, but not decided.[2]

AT WHAT TIME AN ARREST CAN BE MADE, AND AT WHAT TIME NOT.—An arrest for *suspectus de fugâ* may be made on any day whenever there is danger of delay, whether on a Sunday, or a Feast, or a Fast day, or any other holy day.[3] But if an arrest is to be made *on any other ground*

[1] Dig. 50, 17, 103, and 39, 2, 5, and 2, 4, §§ 18, 19, 20; Bynkershoek, Op. Om., Obs. 7, 3; Van Leeuwen's Peckius Van Besetten, Chap. 6; Bort van Arresten, Chap. 6; *Nisbet and Dickson* vs. *Richardson*, 1 M., 562; *Black* vs. *Rowlands*, 2 R., 75.

[2] *Pocock* vs. *Stoll*, B. for 1868, p. 115.

[3] Peckius 10, 1, and Bort, Chap. 3, § 17.

than that of suspicion of flight, it cannot be made on a Sunday.[1]

An arrest of any kind may be executed at any hour of the night or day.[2]

B.—ARREST OF A PERSON'S GOODS.

As in the case of a person, so the arrest of his goods may be of two kinds :—

1. Either in satisfaction of a judgment, or
2. To found jurisdiction.

The attachment of a person's goods, to satisfy a judgment, will be found more fully treated of in the Chapter on "*Writs of Execution.*" But there are many things which under such a writ cannot be arrested, and for such therefore an Order of Court is necessary, and what these are will be found below.

It frequently happens that a person is out of the jurisdiction of the Court, but that he has goods there ; or, although he is within the jurisdiction, there may be good reasons for arresting his goods. The object in both cases of arresting the goods, whether movable or immovable, is either for the sake of founding the jurisdiction on them or of conserving them, in order to prevent their being removed or otherwise parted with, pending a settlement of a coming action or one to be instituted, and afterwards to sell them in execution of a judgment obtained.

Though the Supreme Court has jurisdiction on all land within this Colony without specially asking to found jurisdiction, yet it has been the invariable practice of the Court in recent years, where a party is out of the jurisdiction of the Court and he has to be sued by Edictal Process in respect of the land or a Bond on the land in this Colony, while granting the leave to sue, at the same time also to order an

[1] Rule of Court 10, and see Chapter "*Civil Imprisonment.*"

[2] Voet 2, 4, 24; Bort, Chap. 6, §§ 7 and 8.

attachment of the land to found jurisdiction so as to facilitate the proceedings against the defendant.[1] This order to found jurisdiction is granted as a matter of course when the defendant is out of the Colony. If he is in the Colony and it is feared that he might make away with the land so as to avoid the effect of a judgment that might be given against him, then the application is, not to found jurisdiction, but to interdict and restrain the transfer of the land, either by the owner or by any one else on his behalf, or by the Registrar of Deeds, pending the time or event fixed by the Court. But a strong case must be made out to induce the Court to grant the order under such circumstances.

In the case of movable property, though the defendant may be within the jurisdiction and also his goods, the arrest is sometimes made on his goods, when he is suspected of flight, or there is reasonable fear of a clandestine removal of the goods, or there is fear of dissipation through prodigality. Although the authority of a Judge is as a rule necessary, yet the goods of a fleeing debtor may be detained by private authority if there is an immediate danger of their removal and no time to get a Judge's order; for instance, if a lodger wants to remove his things unexpectedly, with intention to defraud the innkeeper of his debt, they may be detained privately until there can be a handing over to the public authority. A person may detain also another's goods or things carried on to his own ground, or animals found on his ground, and where damage is done, until the owner satisfies him or gives security.[2] This kind of arrest takes place not only before a suit has commenced, but even during it, and at any time after whenever a frustration of the suit arises; as, for instance, by alienation or transfer of the thing, or by the removal of the thing, until there is security that the judgment will be satisfied.

Though a debtor is arrested, his goods also may nevertheless be arrested and detained, and they may be arrested also,

[1] *Einwald* vs. *The German West African Company*, 5 J., 86; *McLeod* vs. *Benjamin*, 9 J., 183; *Ellerton Syndicate* vs. *Hutchings*, 3 C. T., 124; *Schunke* vs. *Taylor and Symonds*, 8 J., 103.

[2] But see Pound Ordinance as to certain animals which must be impounded

and the creditors placed in possession of them, though he is within his dwelling-house but not yet arrested.

As a general rule the goods of every person and every kind of thing belonging to him can be arrested, unless they come within the exceptions hereinafter mentioned; and such arrestable goods are arrested and detained by judicial authority for greater security in the pending action, and they are to be inventoried and kept in safety, and cannot be removed or sold without the authority of the Court or the consent of the plaintiff, pending a settlement of the suit, unless adequate and approved security be given by the defendant.[1]

The preliminary proceeding for the arrest of land or of goods is by petition to the Court, supported by affidavit, setting forth the circumstances of the plaintiff's claim, and specifying the goods or property of the defendant to be arrested, and stating where they are situated, and why recourse is had to the extraordinary remedy of an arrest, instead of the usual and ordinary mode of recovery by action, or enforced by writ of execution on judgment. The Court must be satisfied that the petitioner has, *primâ facie*, good grounds for his application; if so, it can then make any discretionary order thereon, as from the justice of the case may seem reasonable. To the respondent, of course, an opportunity is always given, upon good cause shewn, to have this temporary arrest set aside.

Though the arrest of goods is more easily or sooner granted than the arrest of persons, on the ground that it is not so prejudicial, yet the application for an arrest of goods can be made only to, and granted by, the Court or a Judge;[2] whereas persons may be arrested in certain cases without a Judge's order, under the 8th Rule of Court.

GOODS OR THINGS THAT CAN BE ARRESTED.—Anyone who has a mandate to cite another in law can also detain his goods for the purpose of founding jurisdiction, even if the

[1] Peckius 1, 1, 4, and 1, 1, 5 and notes; Merula 4, 2, 25 and notes; V. d. Linden, Jud. Prac., 2, 18, 3–5; Van Alphen, Vol. I., Chaps. 24 and 25; Req. 3–12; Voet 2, 4, §§ 2, 17, 28; Bort van Arresten, Chaps. 1, 2 and 3, and Chap. 8, §§ 30 and 31.

[2] Voet 2, 4, 50; Bort, Chap. 3.

mention of making arrest be not made in the mandate ;[1] and as a general rule the goods of everyone can be arrested, and every kind of thing, and for the same reasons as persons can be arrested. A few things that can be arrested, and on which some doubt sometimes exists among beginners, are here mentioned :—

(*a*) A *Ship*, or a *part of her*. If a ship is owned by several parties, the share in her of one of them may be arrested for his debt, though the debt be unconnected with the ship. The owners of the remaining part may, however, release the whole ship so that she may proceed to sea, but the arrest remains good wherever she may go and as long as she remains afloat.[2]

For the debts of a ship in a foreign port, or in a different jurisdiction, or for the debts or obligations contracted by her Captain on her behalf, or where the ship is responsible for the due delivery of cargo or luggage, the ship may be arrested *jurisdictionis fundandæ causa*.[3]

The question sometimes arises: In what case should the Captain, and in what case should the ship, be arrested? So far as the obligations of the ship are concerned, it seems to be purely a question of expediency; for the ship is liable for all her debts, and all other obligations entered into by her or on her behalf; and so is the Captain, in his capacity as such, as the representative of the owners. In these cases either, or both, may be arrested. But the main object of the arrest of a ship is to found jurisdiction, where before there was no jurisdiction; and suppose judgment to be obtained against the Captain, and he cannot satisfy it, execution cannot issue against a ship on which there is no jurisdiction, until such jurisdiction has been founded. But a ship may sometimes be arrested for no debts contracted either by her or by her Captain on her behalf, but for the debts due to an outside creditor by her owner, who is out of the jurisdiction. In such a case the Captain cannot be arrested, but only the ship; on

[1] Voet 2, 4, 33.

[2] Vroman 1, 1, 25; Bort, Chap. 5, §§ 4 and 5.

[3] *Wollaston* vs. *Hunt*, and *Dunell and Stanbridge* vs. *Van der Flank*, 3 M., 110 and 112; *Lippert & Co.* vs. *Desbats*, B. for 1869, p. 66; *Reid and others* vs. *Crozier and Cloete*, 2 Searle, 183; *re Petunia*, 2 E.D.C., 271.

the other hand, the Captain may have contracted debts or entered into obligations beyond the scope of his authority, in which case the ship cannot be arrested, unless the Captain is part owner of the ship. But where the ship and her owners, and the Captain and the creditors, are all within the same jurisdiction, and do not intend to leave it, neither the Captain nor the ship can be arrested.

If the ship is to be arrested, the arrest is effected by attaching a copy of the writ to the main-mast. An arrest of a ship by an order of the Vice-Admiralty Court is effected by attaching the writ itself for a short time to the main-mast, or the single mast, and by leaving a copy of the writ attached thereto.[1] By Statute 53 and 54 Vict., Chap. 27, the Supreme Court is substituted for the Vice-Admiralty Court.

(*b*) *Money* of a judgment debtor may be taken from him if in his possession, by virtue of the usual writ of goods and chattels.[2] But money of the debtor in the hands of a third party, as, for instance, in a bank or elsewhere, can be attached only by an order of Court to satisfy a creditor's claim. To obtain this order, a petition must be made to the Court, setting forth why the application is made, and where the money is, and what the apprehended danger is of the possible loss or withdrawal of the money if not secured by the Court's order; for instance, if there is a dispute about the particular sum of money lodged in the bank, or in the hands of a third party; or if the defendant is out of the jurisdiction of the Court, and an action for damages is pending, or about to be instituted against him.[3] In the case of the *Standard Bank* vs. *Kruger & Verster*,[4] the Supreme Court granted an arrest on the money due to the defendants by the Colonial Government and in the hands of the latter, for a debt due by the defendants to the plaintiffs, contracted in this Colony, though at the time of the arrest they were domiciled in the Orange Free State.[5]

[1] 10th Rule, V.A.C.

[2] See Chapter "*Writs of Execution.*"

[3] Placaat 31st January, 1609, and 16th December, 1670, G.P.B., Vol. 4, p. 483; Voet 2, 4, 50; *Whitcome* vs. *Executors of Van As*, 1 M., 339; *Mathews* vs. *Hart*, decided Feb., 1874, not reported.

[4] Decided 24th Jan., 1888, not reported.

[5] See also as to money in the hands of the sheriff, the balance of a previous execution (*McIntosch* vs. *Botha*, 6 C. T., 51.

(*c*) *Bonds*, or other securities, wherever they may be, except when in favour of the State. Bonds are regarded as movables.[1]

(*d*) The *debt* of, or money due by, one's debtor's debtor, in his own or in the hands of another, to satisfy so much of the debt as one's debtor owes. In this case also, as in that of an arrest of money in the hands of a third party, the leave of the Court is first required.[2] But an arrest made by a creditor of the cedent subsequent to the cession is ineffectual to attach a debt in the hands of the cedent's debtor.[3]

See page 202.

(*e*) Goods held in common by a debtor and another to the extent of the debtor's interest therein, though the thing held in common is in its nature indivisible.[4]

(*f*) Goods given by a debtor in pledge to a creditor who is one's debtor, and which he may also sell after obtaining judgment, provided one pays his creditor his debt for which the goods were pledged.[5]

(*g*) Landed or immovable property, whether mortgaged or not, of the owner who is not within the same jurisdiction, and in order to found jurisdiction on the land.[6]

(*h*) Cattle, horses, building materials, instruments of culture, and all animate and inanimate things.

(*i*) Cattle of another found in your grounds or in your field, for the damage done by them.[7]

(*j*) If perishable articles are arrested, they must be sold at once or within a reasonable time, for the highest price.

(*k*) Goods that one may have sold, but not yet delivered, he may detain till he is paid, unless another arrangement has been made before; but he may arrest such goods, though delivered, if he is not yet paid, for it is understood that the seller remains owner of the goods, though delivered, when no stipulated time of payment has been agreed upon;[8] and he must claim the goods within six weeks, or demand payment for cash within the same period. If he does not claim within

[1] Bellum Jur., Cas. 26; Sande 1, 17, 6; Loenius, 50.

[2] Sande 1, 17, 1; Peckius 4, 11; Bort, Chap. 5, §§ 10, 11, 16, 31.

[3] *Smuts* vs. *Stack*, 1 M., 297.

[4] Voet 2, 4, 55; Bort 5, §§ 4, 5.

[5] Voet 2, 4, 56; Bort, Chap. 5, § 6; Zutphen, Ned. Prac., Tit. "Arrest."

[6] Peckius 5, 21.

[7] But see the Pound Ordinance (No. 16 of 1847) for such animals as cannot be retained, but must be sent to the Pound.

[8] Grotius 2, 3, 17, and Groenewegen's Notes thereon.

that period, the goods will be considered as sold for credit. But in the case of insolvency of the debtor, this claim must be made in writing within ten days after the sale.[1]

(*l*) Goods of a deceased person, in possession of an executor, unless there are circumstances which make it advisable that the goods should be realised by the executor.

(*m*) One's own goods, if not pledged to another, for one's goods may have been removed by force, or have been stolen from one.

(*n*) The fruit of another person lying on one's own ground.

(*o*) The subject of a *fidei commissum* for a debt or judgment due by the *fidei commissary* heir.[2]

(*p*) The goods found in a house or on a farm, for the satisfaction of rent due by the tenant or sub-lessee.[3]

(*q*) A person's salary or pension.[4]

But the salaries or pensions of military officers are not liable to arrest for more than *one-third* thereof, and not at all for debts under 25 guilders.[5] Salaries of clergymen are liable to arrest to one-half thereof only.[6]

(*r*) Having arrested a person's goods does not free him personally from an arrest if he is *suspectus de fugâ*.[7]

GOODS OR THINGS THAT CANNOT BE ARRESTED.—Though as a general rule goods or things, whether movable or immovable, animate or inanimate, can be arrested, there are the following exceptions :—

(*a*) The goods of the King and of the members of the Royal Family; of the servants of the King; and of foreign ambassadors or of their attendants, and of their servants, which they require while they are stationed abroad at a foreign Court, or while going thither or returning home.[8]

[1] Act 38 of 1884, § 11.

[2] *Maasdorp* vs. *Russouw*, decided in 1872, not reported.

[3] Van Leeuwen 5, 7, 24; *Board of Executors* vs. *Stigling*, B. for 1868, p. 25; *Price* vs. *Cloete*, 3 J., 139; *Warren* vs. *Clements*, 1 C. T., 287; *Greef* vs. *Pretorius*, 5 C. T., 132.

[4] *Re Blackall*, decided 1888, not reported.

[5] Res. 3rd May, 1725, and 15th September, 1727, G.P.B., Vol. 8, p. 845.

[6] G.P.B., Vol. 2, p. 2614, § 38.

[7] Voet 2, 4, 19 and 49.

[8] Loenius 82.

(d) *Obligations* or *bonds* bearing interest in favour of the State or of the receivers of the revenue, or for arrear interest.[1]

(e) *Students' Books* which are necessary for the particular studies in which they are engaged.

(f) *Military Weapons* and instruments, and the cattle and horses belonging to the army.[2]

(g) Food for men, and provender for cattle, and other necessary things that are being conveyed to the camp.

(h) *Ships of War*, or any of the tackle, apparel, or furniture thereof, or anything therein or thereon that is required or necessary for the purposes of the ship.[3]

(i) The goods of a wife for the debts of her husband, unless she has taken the debt on herself.

(j) A *Corpse*, or the dead body of a debtor. In ancient days the dead body of a debtor was arrested, and kept till the debt was paid by the relatives or friends of the deceased; but this law was abolished in order that the dead might be buried, and the corpses not be disturbed as a remembrance of human perdition.[4]

(k) A *Omentation*, or the food one has procured for the day for his necessary sustenance, or even what is bequeathed for one's daily aliment; and so also whatever one absolutely needs for his necessary daily wearing apparel.[5]

(l) The pension of a widow of a clergyman allowed her by the State.[6]

(m) The *wages of sailors*, excepting for house rent incurred and for necessary food and clothing bought *while in service*, but not before.[7]

(n) Two foreigners belonging to the same jurisdiction cannot arrest each other's goods in another jurisdiction.[8]

[1] Placaat of 10th March, 1661, G.P.B., Vol. 2, p. 2039, and the Belgian Jurid., Case 26.

[2] Res. Holl., 18th Dec., 1657; and P. A. Linden, Laws of Holland, 4, 3, 6.

[3] Van Zurck, Codex Batavus, Tit. "Arrest," § 24.

[4] Hol. Cons., Vol. 1, Con. 332, and Vol. 3, Con. 142.

[5] Dig. 25, 3, and 42, 3 and 5; Voet 2, 4, 51; Peckius 5, 14; see also the Insolvent Ordinance, § 59.

[6] G.P.B., Vol. 2, p. 2613, Art. 3 of Placaat of 1st April, 1660.

[7] Placaat 18th Dec., 1653, G.P.B. Vol. 1, p. 967.

[8] *Wilhelm* vs. *Francis*, B. 1876 pp. 164 and 216; *Einwald* vs. *The German West African Company*, 5 J., 86.

(*b*) *Obligations* or *bonds* bearing interest in favour of the State, or on the receivers of the revenue, or for arrear interest.[1]

(*c*) *Students' Books* which are necessary for the particular studies in which they are engaged.

(*d*) *Military Weapons* and instruments, and the cattle and horses belonging to the army.[2]

(*e*) Food for men, and provender for cattle, and other necessary things that are being conveyed to the camp.

(*f*) *Ships of War*, or any of the tackle, apparel, or furniture thereof, or anything therein or thereon that is required or necessary for the purposes of the ship.[3]

(*g*) The goods of a wife for the debts of her husband, unless she has taken the debt on herself.

(*h*) A *Corpse*, or the dead body of a debtor. In ancient days the dead body of a debtor was arrested, and kept till the debt was paid by the relatives or friends of the deceased; but this law was abolished in order that the dead might be buried, and the corpses not be disturbed as a remembrance of human perdition.[4]

(*i*) *Alimentation*, or the food one has procured for the day for his necessary sustenance, or even what is bequeathed for one's daily aliment; and so also whatever one absolutely needs for his necessary daily wearing apparel.[5]

(*j*) The pension of a widow of a clergyman allowed her by the State.[6]

(*k*) The *wages of sailors*, excepting for house rent incurred and for necessary food and clothing bought *while in service*, but not before.[7]

(*l*) Two foreigners belonging to the same jurisdiction cannot arrest each other's goods in another jurisdiction.[8]

[1] Placaat of 16th March, 1661, G.P.B., Vol. 2, p. 2639, and the Bellum Jurid., Case 26.

[2] Res. Holl., 18th Dec., 1657; and V. d. Linden, Laws of Holland, 4, 3, 6.

[3] Van Zurck, Codex Batavus, Tit. "Arrest," § 24.

[4] Hol. Cons., Vol. 1, Con. 332, and Vol. 3, Con. 142.

[5] Dig. 25, 3, and 42, 3 and 5; Voet 2, 4, 51; Peckius 5, 14; see also the Insolvent Ordinance, § 59.

[6] G.P.B., Vol. 2, p. 2613, Art. 32 of Placaat of 1st April, 1660.

[7] Placaat 18th Dec., 1653, G.P.B., Vol. 1, p. 967.

[8] *Wilhelm* vs. *Francis*, B. 1876, pp. 164 and 216; *Einwald* vs. *The German West African Company*, 5 J., 86.

(*m*) *Clergymen's Pensions*, the half thereof.[1] But this of course applies only to pensions granted by the State.

GENERAL.—The arrest of *movables* is effected by making an inventory, and retaining possession thereof;[2] that of *immovable* property by describing its situation and extent, and by lodging a notice thereof with the Registrar of Deeds, and serving a copy on the owner and upon the occupier.[3] The arrest of a ship is effected by attaching the writ for a short time to the main-mast, and by leaving a copy of the writ attached thereto.[4] The R. M. Courts have no jurisdiction to arrest a person *suspectus de fugâ*, though they have for civil imprisonment for judgment debts; but they may arrest movables only, and for the payment of rent only, to the extent of their jurisdiction.[5]

To arrest a person at least £15 must be due, but no money value is required in order to arrest goods. When goods have been arrested to abide the result of an action, execution in satisfaction of such judgment to be given may issue against these goods without any further order of Court.

As in the arrest of persons, so in that of goods, the Sheriff cannot release these goods from the operation of the arrest, except in the case of the writ just mentioned, without the previous order of Court or the consent of the parties.[6]

To attach goods by virtue of a Circuit Court process, the same proceedings, under similar circumstances, must be resorted to as in the Supreme Court;[7] and such process must be made returnable on the first Circuit Court day.[8]

If a person's claim does not amount to £15, there is nothing to prevent him from buying up claims from others, and *bonâ fide* getting cession thereof for value received, so as to swell his claim to the arrestable amount, and then have the defendant arrested. But the new claims, or cessions, must be specified in the affidavit to arrest, to shew the *bonâ fide* nature of the transaction.

[1] G.P.B., Vol. 2, p. 2614, Art. 38.
[2] Ordinance 37, § 8.
[3] Rule of Court 363.
[4] 10th Rule of the V.A.C.
[5] Act 20 of 1856, § 26, and Rules thereunder 52 and 53.
[6] Bort, 8, 20, 31.
[7] Rules 165 and 166.
[8] Rule 167.

In the case of a person the arrest must be confirmed on the return day of the writ, except where bail is given and appearance entered ;[1] and in cases ready for judgment such as in provisional sentences, judgment may also be asked for at the same time. In the case of *Erlank and Co.* vs. *Naude* (decided Oct. 1893), the Chief Justice said :—

"The case of *Loraine* vs. *Potter and Bellew* was for an illiquid claim, but in principle I confess I do not see any difference between a liquid and illiquid case. I think we are bound to follow in this respect the previous practice of the Court. In the first instance a motion is made for confirmation of this writ of arrest, and the Court will make that order ; then there is an application for provisional sentence which the Court will also grant."

Formerly also there had to be a confirmation of the writ in regard to the arrest of money, or goods, when the defendant was summoned to hear the arrest confirmed.[2] But of late years the practice has been when the Court gives an order for the arrest of goods, or money, &c., to grant also a rule *nisi*, calling upon the defendant to shew cause, on the return day thereof, why the rule should not be made absolute, or the arrest abide the further order of the Court.

In every instance where a person may be arrested, his goods are also liable to arrest ; but not necessarily the converse, for instance :—

(*a*) You may not arrest the debtor of your debtor, but you may arrest his goods.

(*b*) You may not arrest insane persons, but you may arrest their goods.

(*c*) You may not arrest persons under the guardianship of another for a debt contracted in their name by the guardian, but you may arrest their goods.

(*d*) Though you may not arrest an ambassador, or certain goods of his, you may arrest such of his goods as are not required for, or form part of, his ambassadorial purposes.

(*e*) Though you may not arrest the Governor or a Judge without an order of Court, you may arrest his goods without such an order.

[1] *Ryan* vs. *Abrahams*, B. for 1873, p. 93, and *Loraine* vs. *Potter and Bellew*, 2 C. T., 110.

[2] *In re the Insolvent Estate of Van As*, 1 M., 539.

(*f*) You may not arrest representatives of another person, or of estates, for acts or defaults not their own, but you may arrest the goods of the person or the estates they represent.

The arrest *suspectus de fugâ* has several things in common with an arrest for civil imprisonment, on an unsatisfied judgment, and which are the same in the following cases; for example:—

(*a*) The mode of arrest, and the time when, and the place where.

(*b*) The Sheriff's liability for permitting escape.

(*c*) The re-arrest, after escape from lawful arrest, without a fresh order of Court.

(*d*) The personal arrest by a creditor, when there is *periculum in mora.*

(*e*) The arrest of the defendant in his own person.

(*f*) The gaoler's liability for permitting escape from gaol.

(*g*) The discharge from gaol without an order of Court, or consent of parties.

(*h*) The maintenance in gaol.

Arrest *suspectus de fugâ* differs from civil imprisonment in the following respects, as the parallel column here shews, but only *till judgment* is given; *after which* the defendants are on the same footing, and may be sued for civil imprisonment, but if they attempt flight before this decree is obtained, they may be arrested by an order of a Judge.

ARREST.	CIVIL IMPRISONMENT.
(*a*) Detained in gaol till bail, or till judgment, is given.	(*a*) Detained till debt is paid; or in R. M. Court judgment, till fulfilment of sentence of imprisonment.
(*b*) To answer an action, or to give security in case of *suspectus de fugâ.*	(*b*) Only in satisfaction of a judgment debt already obtained.
(*c*) Under 8th Rule of Court, or by order of a Judge.	(*c*) By ordinary writ.
(*d*) Surrender of an estate has nothing to do with the arrest.	(*d*) After surrender of estate cannot be arrested, and if imprisoned it is in discretion of Court to discharge from imprisonment.

(*e*) On judgment being given, defendant is discharged from imprisonment, if not out on bail; but may afterwards be sued for civil imprisonment.	(*e*) See *b*.
(*f*) Defendant can be imprisoned only till judgment is given.	(*f*) See *a*. and *b*.
(*g*) Cannot be arrested by R. M. Court judgment.	(*g*) May be arrested by R. M. Court judgment.
(*h*) May be arrested to do, or not to do, any act or fact.	(*h*) See *b*.
(*i*) May be arrested in representative capacity.	(*i*) Cannot be imprisoned in representative capacity, but may be in private capacity for an act done in representative, if the Court should think acts and conduct warrant it.
(*j*) Certain persons privileged from arrest.	(*j*) No one in this Colony privileged from civil imprisonment.
(*k*) May be arrested on a Sunday.	(*k*) Can be arrested on a Sunday only when defendant suspected of flight.
(*l*) *All* goods can be arrested if not privileged, and for any cause: except by R. M. Court judgment, when only goods for, and to the extent of, rent due.	(*l*) No goods arrested.
(*m*) Arrest may be discharged by anticipation.	(*m*) No such thing in civil imprisonment.
(*n*) Arrest can be granted only for certain good grounds.	(*n*) See *b*.
(*o*) Cannot be arrested for any claim under £15.	(*o*) Can be arrested for any judgment debt, however small.
(*p*) Writ must be returnable on first Court day, if possible.	(*p*) Writ may be returnable at any time.
(*q*) Arrest must be confirmed on return day of writ, except when bail given.	(*q*) No confirmation necessary.
(*r*) Arrest often the beginning of an action, but also during the action to abide by its result.	(*r*) See *b*.
(*s*) In arrest, copy of writ must be served on defendant.	(*s*) Defendant not entitled to copy of the writ.

IN WHAT CASES PERSONS AND GOODS ARE RELEASED FROM AN ARREST IPSO JURE:—

(1) Death releases a person from arrest, but not his goods.

(2) By solution or payment of the debt or obligations on which the arrest is founded.

(3) By giving satisfactory security *de judicio sisti, et judicatum solvendo*, and by choosing domicile in the jurisdiction.[1]

(4) When the arrest is void *ab initio*, or set aside.[2]

Petition for an Antidotal order, or an order to prevent the arrest of a person.

(Heading.)

1. That A.B. of . . . . has made a demand on your petitioner for payment of the sum of £ . . . . which he alleges to be due to him for certain 15 leaguers of brandy purchased from him by your petitioner on or about the . . . . day of . . . . last past.

2. That your petitioner admits having on or about that date purchased from the said A.B. 20 leaguers of brandy, or as many more as he could distil from his last vintage, and of a certain strength, and at the price named, but which brandy he has failed to deliver, or any part thereof.

3. That the said A.B. has offered your petitioner only 15 leaguers of brandy, and of an inferior kind, and not distilled of grapes, but of peaches and other fruit, and of molasses; and that your petitioner has declined to receive them.

4. That the said A.B. knew some time ago that your petitioner was about to proceed this month to Europe for the benefit of his health; and that he would be away an indefinite period; yet he never took steps to enforce his alleged claim till yesterday, when he had the said demand sent to your petitioner.

5. That your petitioner has taken passage for himself and family by the royal mail steamer . . . . which leaves Table Bay for England next Wednesday afternoon; and he has reason to fear that the said A.B. will carry out his threat of having your petitioner arrested at the last moment when the steamer is about to leave the Docks, or too late to have the question of the arrest brought before the Court and decided before the steamer leaves: in either case your petitioner and his family will be very greatly inconvenienced; and will not be able to go to England till the following steamer, of the same company, sails, 14 days thereafter, even though your petitioner should not lose the benefit of the passage money already paid.

6. Your petitioner further says that he is domiciled in this Colony: and that he is only leaving for the benefit of his health, of which the said

[1] Sande 1, 17, 2; and Bort, Ch. 8, § 4.

[2] Peckius, Ch. 45; Bort, Ch. 8.

A.B. has been informed; and that it will depend upon medical advice in England how long he is to remain there; but unless he is ordered to remain longer, your petitioner has no intention to stay away more than six months.

7. That, during the absence from the Colony of your petitioner, E.F. of . . . ., who holds your petitioner's general power of attorney, will carry on his business and transact all his affairs, of which the said A.B. has also been informed.

8. That, instead of the said A.B. having an action against your petitioner, your petitioner has an action against him for breach of contract; and he has also a just cause of complaint against him for trying to palm off his peach-and-molasses brandy, of an inferior kind, for the grape or dop brandy, of a superior kind, as per agreement, but owing to your petitioner's illness and contemplated departure, and as he has made no payment, and taken no delivery of the brandy, he did not care, nor did he intend, to take any further notice of the defendant's conduct, thinking the matter had dropped with the detection of the defendant's contemplated fraud, and that he had been sufficiently punished thereby.

9. Wherefore your petitioner humbly prays that your Lordships may be pleased to declare that he is protected from an arrest, under the circumstances here detailed; and that there is no cause of grounds for his arrest, as regards the present demand or threatened action of the said A.B.; and that if the said A.B. should apply for a writ of arrest to any Court or Judge, or under the 8th Rule of Court, it may not be granted; and your petitioner, &c.

(*Affidavit of Verification.*)

(NOTE.—*Notice of motion of this petition should be given to A.B., or his attorney.*)

Petition to arrest money.

(Usual heading.)

1. That your petitioner obtained judgment against C.D. in this Honourable Court on the . . . . day of . . . . for the sum of £ . . . . sterling, with interest and costs; and that the taxed costs amount to £ . . . .

2. That your petitioner thereupon issued a writ against the goods and chattels of the said defendant, to which the Sheriff has made a return of *nulla bona*, and the extra taxed costs incurred thereby amount to £ . . . .

3. That the defendant has no landed property, but he has a fixed deposit to his credit in the . . . . Bank of . . . ., amounting to £ . . . .

4. That the total sum now due to your petitioner for capital and costs is £ . . . ., exclusive of the interest on the capital, at . . . . per cent., from the . . . . day of . . . ., in terms of the said judgment.

5. Wherefore your petitioner humbly prays that your Lordships may be pleased to grant an order for the attachment of the money in the custody of the said Bank, sufficient to satisfy the exigency of the said

writ, with the costs since incurred, and to be incurred, therein; and also the taxed costs of this application. And your petitioner will ever pray.

(*Affidavit of Verification.*)

(NOTE.—*Notice of motion of the hearing of this petition should be given to the defendant, unless there is reason to fear that the money might be withdrawn before the order could be obtained, in which case a temporary interdict, or* rule nisi, *should first be asked for.*)

Petition to arrest a pension.

(Heading.)

(Take in clauses 1 and 2 of the foregoing petition.)

3. That the defendant has no assets whatever at present out of which the said writ, or any part thereof, can be satisfied; but he is entitled to an annual pension of £ . . . . sterling from the Colonial Government, and which is payable in monthly equal parts at the office of the Civil Commissioner of . . . ., and that he is well able to pay your petitioner a portion thereof, monthly, in liquidation of the said judgment.

4. Wherefore your petitioner humbly prays that your Lordships may be pleased to grant an order attaching the pension of the said defendant in the hands of the said Civil Commissioner as it from time to time shall become due; and thereout to authorise the said Civil Commissioner monthly to pay to your petitioner the sum of £ . . . ., or such other sum as to your Lordships shall seem just and reasonable, until the said judgment and costs shall be fully paid and satisfied; and also the taxed costs of this application. And your petitioner, &c.

(*Affidavit of Verification.*)

(NOTE.—*Notice of motion of this petition should be given to the defendant in time to be heard in answer to it.*)

Petition to arrest a Ship, to found jurisdiction.

(Heading.)

1. That Messrs. C.D. & Company of Civita Vecchia, Italy, instituted an action in this Honourable Court against your petitioner, who is domiciled in this Colony, for the recovery of £5,000 sterling for certain marble slabs sold by them to your petitioner.

2. That before entering appearance to the action, your petitioner demanded from the plaintiffs security; and E.F. and G.H. were offered to, and accepted by, your petitioner as sureties for the due fulfilment of any judgment that might be given.

3. That at the trial your petitioner proved his contra claim, and claim for damages, and on the . . . . day of . . . . this Honourable Court gave judgment for your petitioner for £550 and costs.

4. That, as the said plaintiffs have no assets whatever in this Colony, proceedings were taken against the said sureties for the recovery of the

judgment and costs; but they have since surrendered their estates as insolvent, and there is no prospect of any dividend being awarded to their concurrent creditors.

5. That there is now in Table Bay an iron screw steamship called the *Ariadne*, of 1100 tons, or thereabouts, fitted with engines of 130 horse-power nominal; and is of the value of £17,500, and is owned by several parties all domiciled out of the jurisdiction of this Honourable Court, and the said C.D. & Co. are the registered owners of 8-64ths share in the said ship.

6. That the said ship arrived here yesterday from the island of Capri with a cargo of marble, partly for this port and partly for other ports in this Colony, and ultimately for Mauritius.

7. Your petitioner is desirous of arresting the shares of the said C.D. & Co. in the said ship, to found jurisdiction therein, for the purpose of satisfying his said judgment.

8. Wherefore your petitioner humbly prays that your Lordships may be pleased to grant an order for the arrest of the said 8-64ths share of the said C.D. & Co. in the said ship, so as to found jurisdiction therein for the purpose of satisfying the judgment and costs hereinbefore mentioned; and for the taxed costs and charges of the proceedings herein. And your petitioner, &c.

(*Affidavit of Verification.*)

Petition to arrest goods to found jurisdiction.

(Heading.)

1. That in January last year your petitioner entered into a verbal agreement in this town with C.D., E.F., and G.H.; (all of us then in Cape Town—your petitioner and E.F. then were, and still are, domiciled here, but C.D. and G.H. were then domiciled in Ovampoland)—to go on a trading expedition in the northern portions of South Africa *viâ* Walwich Bay, to and through Honoruro, and further north, with the object of securing as many ostrich feathers and as much ivory as could be bartered for, or otherwise obtained. The agreement further was that the defendants had to provide two waggons laden with certain kinds of merchandise from I.J., a merchant in this town, and at their expense; and that your petitioner was to do the trading business; and that the produce to be obtained was to be sent to Cape Town to the said I.J. for transmission to Europe to be realised there; and that after deducting his selling charges with interest and commission, &c., the balance profits were to be equally divided between the said defendants and your petitioner; and that in addition to your petitioner's profits he was to be paid by the defendants the sum of £5 for every month he should be engaged in the expedition.

2. That the waggons and goods were accordingly sent to Walwich Bay, whence your petitioner went to Honoruro, and from there further north; and traded among, and bartered goods with, the various tribes he met from place to place: he also hunted, and was engaged in this trading

and hunting expedition, before he got back to Walwich Bay, for 22 months, and arrived at that place on the . . . . day of . . . . with the two waggons full of ostrich feathers, ivory, horns and skins of various antelopes and deer : all to the value of about £8,000.

3. That on arriving at Walwich Bay from the interior at the last date just mentioned, your petitioner found the said E.F. and I.J. there, and who, then and there, took forcible possession of the waggons and goods and produce ; and dismissed your petitioner from the care and custody thereof, alleging that, as your petitioner was so long away, they had lost the market for that kind of produce, and refused to pay your petitioner the £5 a month agreed upon, or to allow him any share in the produce in the waggons, adding that your petitioner might, if he liked, go to law about it.

4. Your petitioner further says that the waggons are ordered to remain at Walwich Bay, but the said goods and produce are coming up by the ship *Jaspar*, which is expected at Table Bay on Monday next ; and that they will at once on arrival be shipped to England by the mail steamer which leaves on Wednesday next.

5. That there is due to your petitioner his fourth share of the clear profits of the said goods,—about £1,750 ; and there is also due to him 22 months' salary at £5 a month ; total £1,860.

6. That E.F. is coming to town by the said ship, but C.D. and G.H. are at present said to be at Lake N'Gami, but the said I.J. will ship away the goods and produce, etc. ; and your petitioner is desirous of at once instituting an action against all the parties to have his rights declared by this Honourable Court ; but your petitioner has reason to fear that, if the said feathers and ivory and other produce are not arrested, they may be sold by the said I.J. or E.F., and the proceeds detained by them, or either of them, for their own benefit, or for the benefit of themselves and the other parties, and allow your petitioner nothing whatever, as they ignore his claims altogether.

7. Wherefore your petitioner humbly prays that your Lordships may be pleased to grant an order for the arrest of the said ivory, feathers and other produce, on their arrival here ; and to be detained pending the result of an action forthwith to be instituted by your petitioner in this Honourable Court against the said parties for a declaration of rights as to a division of the profits of the said goods and produce ; and for the fulfilment of the said agreement with your petitioner : such action to be brought to trial during the next term ; and your petitioner, etc.

(*Affidavit of Verification.*)

Petition to arrest landed property, to found jurisdiction : and to sue by Edictal Citation owing to defendant being out of the Colony.

(Heading.)

1. That A.B. of D'Urban, Natal, is indebted to your petitioner in the sum of £500, by virtue of a judgment of the Supreme Court at Natal, bearing date the . . . . day of . . . . for a breach of the contract entered

Notice to be served on defendant with copy of foregoing petition.

(Heading.)

Sir,—Take notice that application will be made to the Honourable the . . . . Court on . . . . the . . . . of . . . ., at . . . . o'clock in the forenoon, on behalf of the plaintiff in terms of the prayer of his petition, of which a copy is herewith, when you will be required to shew cause (if any) to the contrary; and to shew cause also why you should not be ordered to pay the costs of this application.

Dated at . . . . this . . . . day of . . . . .

Yours, &c.

. . . . . .

Petitioner's Attorneys.

To C.D.
of . . . .
the above Defendant.

(NOTE.—*If there is no time to apply for an interdict or* rule nisi, *or for a notice of motion to be heard, then petition as follows:*—)

Petition for a peremptory order to arrest a defendant to give security to answer an action already commenced, and to abide by the judgment thereon.

(Heading.)

1. That your petitioner has an action pending in this Honourable Court against C.D. of . . . . for the recovery of the sum of £ . . . . sterling for goods sold and delivered to him, which case is set down for trial for . . . .

2. That your petitioner has just seen a list of the passengers who are going from this Colony, this afternoon, by the steamer . . . ., bound for Australia, and among them is the name of the said defendant; that upon enquiry at the office of . . . ., the agents in this Colony for the owner of the said steamer, your petitioner was informed by . . . ., a clerk in charge of the passenger-list in the said office, that the name is that of the said defendant, who personally appeared and paid for his passage, and that the said steamer will sail at six o'clock this evening.

3. That your petitioner has endeavoured, but unsuccessfully, to find out the whereabouts of the said defendant in town; and your petitioner fears that he is purposely keeping out of the way, with the view of getting on board ship at the last moment, and thus escape the consequences of the said action.

4. That in consequence thereof there will be no time either to serve the said defendant with a notice of this application, or to apply for a temporary interdict, or a *rule nisi;* and that it will be necessary, therefore, to have the said defendant forthwith arrested to give security to answer the said action, and to abide by the judgment to be given therein.

5. That from the unexpected and suspicious way in which the said defendant is about to leave the Colony, your petitioner has every reason to believe that he does so also to avoid the consequences of any judgment

that might be given against him in the said action; and that he has no intention of returning to the Colony; and your petitioner is not aware that the defendant has, or will leave, any assets in this Colony sufficient to satisfy such judgment, or any part thereof.

(NOTE.—*If the defendant has property, but insufficient, allege it; for instance, a clause to this effect*:—That the only landed property which the defendant has and of which your petitioner is aware, is the farm . . . . situate in the district of . . . . and which is mortgaged to . . . . for the sum of £ . . . ., being the full value thereof at the present time; that the defendant has already disposed of his household furniture, carriage and horses, at a public auction last week; and your petitioner is not aware that he has any other movable property.)

6. Wherefore your petitioner humbly prays that your Lordships will be pleased to grant an order for the immediate arrest of the said defendant, and for his imprisonment till he shall have given satisfactory security to answer the said action, and to abide by the judgment to be given therein: and your petitioner, &c.

(*Affidavit of Verification.*)

Petition to the Court, or to a Judge, to arrest a party to give security for an unsatisfied judgment.

(Heading.)

The Petition of A.B. of . . . . the above plaintiff,
Humbly sheweth—

1. That your petitioner obtained judgment against C.D. of . . . . the above defendant, in this Honourable Court on the . . . . day of . . . . for the sum of £ . . . . sterling, with costs, in an action wherein your petitioner was the plaintiff and the said C.D. was the defendant.

2. That the taxed costs in the said action amount to £ . . . . sterling.

3. That a writ of execution for the judgment and the costs was, on the . . . . day of . . . ., issued out of this Honourable Court, against the goods and chattels of the said defendant; and a return made thereon that sufficient goods have not been found to satisfy the exigency thereof; and which said writ still remains unsatisfied.

4. That your petitioner intends to sue the said defendant for civil imprisonment, but before he can obtain such decree the defendant will have left the Colony.

5. That the defendant intends to go to England by the mail steamer which leaves here on Wednesday next, he having already taken and paid for his passage; and that he does not intend to return to the Colony; and he has made no provision for the payment of the said judgment.

6. That if the said defendant is not restrained from leaving the Colony, or is not compelled to give security to satisfy the said judgment, your petitioner will have no remedy to obtain payment of, or to enforce, the judgment, or to obtain a decree for civil imprisonment against the said defendant.

Wherefore your petitioner humbly prays that your Lordships may be

pleased to grant an order for the arrest of the said defendant and for his imprisonment and retention in gaol, till he shall have given security to satisfy the said judgment; or till a decree of civil imprisonment can be obtained against him on the first convenient Court day in respect of the said judgment: and your petitioner, &c.

(*Affidavit of Verification.*)

Writ to attach a ship by an Order of Court.

(Heading.)

We command you that, in pursuance of the Order of this Honourable Court, bearing date this day, you forthwith attach the vessel . . . . now lying in the Robinson Dock, Cape Town, and safely keep her pending the result of an action now pending in this Honourable Court, wherein A.B. is plaintiff, and C.D. is the defendant, in which the plaintiff claims (*here briefly state nature of action*).

As it is said, &c.

Witness, &c.

Writ of arrest by virtue of an Order of a Judge to give security.

(Heading.)

We command you that, in terms of the Order of the Honourable Mr. Justice . . . ., bearing date the . . . . day of . . . ., in the matter of C.D. vs. A.B., you take A.B. of . . . . if he be found in this Colony, and safely keep him so that you have him before our Justices of the Supreme Court of our said Colony, at Cape Town, on the . . . . day of . . . . then and there to answer C.D. of . . . . and to shew cause why he shall not (*here state the grounds of the arrest as disclosed in the order, as for instance*) be ordered and condemned to find and give good and sufficient security to stand to, and abide by, the result of, and perform, the judgment that may be given in the action now pending in this Honourable Court between the said A.B. and the said C.D., and in which the said C.D. claims (*here briefly state the nature of the claim, as for instance*) the fulfilment of a certain contract bearing date the . . . . day of . . . ., or in default thereof, damages in the sum of £ . . . . sterling.

As it is said, &c.

Witness, &c.

Affidavit on which to found an arrest, under the 8th Rule of Court, on a promissory note overdue.

(Heading.)

I, A.B. of . . . . make oath and say :—

1. That the above defendant is indebted to me in the sum of £ . . . . sterling, being the amount of a certain promissory note, hereunto annexed, bearing date the . . . . day of . . . ., and payable on the . . . . day of . . . ., made and signed by the said A.B. to and in favour of C.D.,

or order, and endorsed in blank by the latter, and by one E.F., and whereof I am the legal holder, together with the interest thereon from the . . . . day of . . . .

2. That the said defendant is about to leave the Colony for the Transvaal, by next Friday's special mail train, to take up a situation there to which he has been recently appointed: and he has told myself and others that he leaves for that country on Friday next. That on applying to the defendant for payment of the said sum, he at first promised to pay before he left, but he has since disputed the debt, and now refuses to pay me.

3. That I have no mortgage, pledge, or security for the said amount due as aforesaid, or for any part thereof, and that the said amount remains therefore wholly unsecured to me; the endorsers to the note being insolvent, and there were no dividends in their estate to be awarded to me.

Sworn at Cape Town,
this . . . . day of . . . .
Before me,
. . . . . .
J.P.

Writ of arrest on an overdue promissory note, and for provisional sentence.

(Heading.)

We command you that you take A.B. of . . . . if he be found in this Colony, and safely keep him so that you have him before our Justices of our Supreme Court of our said Colony at Cape Town, on the . . . . day of . . . . then and there to answer G.H. of . . . . ; and to shew cause why he hath not paid him the sum of £ . . . . sterling, of lawful money, which he owes to, and unjustly detains from, the said G.H., upon and by virtue of a certain promissory note . . . . bearing date the . . . . day of . . . ., and payable at . . . ., made and signed by the said A.B., to and in favour of C.D., or order, and endorsed in blank by the latter, and by one E.F., and whereof the said G.H. is the legal holder, together with the interest thereon from the . . . . day of . . . . : the said promissory note having, at maturity, been duly presented at . . . . where the same is made payable, but payment thereof refused for want of funds, and due notice of its dishonour given to the endorsers thereof; as it is said;—and unless he shall do so, then summon the said A.B. that he appear on the day and at the place aforesaid, at 10 o'clock in the forenoon, to shew wherefore he hath not done it; and also to acknowledge, or deny, his signature affixed to the said promissory note, or the validity of the said debt.

And also summon the said A.B. then and there to plead to the provisional claim of the said G.H. for payment thereof, under security; with costs; and to join issue thereon.—And serve on the said A.B. a

copy of this writ and summons, and of the said promissory note—whereon the said provisional claim is founded; and return you then and there this writ and summons with whatsoever you have done thereupon.

Witnesses, &c.

Costs, taxed and allowed by the Taxing Officer at . . . . pounds . . . . shillings and . . . . pence.

. . . . . .
Registrar.

Affidavit on which to found an arrest on an open account, under the 8th Rule of Court.

(Heading.)

Between A.B.
Plaintiff,
and
C.D.
Defendant.

I, A.B., of . . . . the above plaintiff, make oath and say:—

1. That the above defendant is indebted to me in the sum of £ . . . . sterling, being the amount for goods and merchandise sold and delivered as per account hereunto annexed.

2. That the said defendant is about to leave the Colony for (*here give facts to prove that he is leaving, for instance*) Australia, and he has taken and paid for his passage by the steamer "Coptic," due here to-morrow, from England, on her way to Australia. That I have called upon the defendant and requested payment of the account, and I also informed him that if he did not pay me by 10 o'clock this morning, I would have him arrested, but beyond his promising to see me paid before he leaves, he has hitherto made no effort to settle with me; and I verily believe that he does not intend to pay me, and that unless he is arrested he will leave the Colony without paying me.

(Or: *if the fact of his contemplated departure cannot be of such direct evidence as is here given, then give the next best evidence of his leaving, as for instance, take another case.*)

3. That the said defendant is making preparations to leave the Colony for Mecca, he having told some people that he would leave by the next mail steamer for Zanzibar, which is advertised to leave here on Friday next, and from thence he would go by another opportunity; and that the object of his visit to Mecca was for the purpose of purchasing stock for his business here. I verily believe that the said defendant is going to leave the Colony for good; and the reason of my belief is that he has sold all his movables and also his stock; and has sublet the store he had on hire for the remaining period of his lease; namely five years, to P.G.; also that on the list of passengers by the next steamer for Zanzibar appears the name of one R.S., and I am informed by T.U., the clerk in charge of the office of the agents of the said steamer, Messrs. O.V. & Co., which information I believe to be true, that the said defendant engaged,

and paid, for the passage in the name of R.S. and received the ticket thereof, saying, at the time, it was for a friend of his; but no such person as R.S. is, so far as I have been able to ascertain, known to any one.

(NOTE.—*This paragraph should, if possible, be supported by an affidavit from anyone to whom the defendant said he was leaving for Mecca; and also the clerk T.U.*)

4. That I have no mortgage, pledge, or security for the said amount due as aforesaid, or for any part thereof, and that the said amount remains wholly unsecured to me.

(Signed) A.B.

Sworn at . . . .
this . . . . day of . . . .
Before me,
. . . . . .
J.P.

Writ of arrest on an open account.

(Heading.)

We command you that you take A.B. of . . . . if he be found in this Colony, and safely keep him so that you have him before our Justices of our Supreme Court of our said Colony, at Cape Town, on the . . . . day of . . . . then and there to answer C.D. of . . . . and to show cause why he hath not paid him the sum of £ . . . . sterling, which he owes and unjustly detains from him, being the amount of a certain account for (goods sold and delivered): as it is said; and have you there and then this writ with what you have done thereupon.

Witness, &c.

Affidavit to arrest for libel, under the 8th Rule of Court.

(Heading.)

I, A.B. of . . . . make oath and say:—

1. That the defendant is indebted to me in the sum of £ . . . . sterling as and for damages sustained by reason that he did, in the newspaper called the . . . . of the . . . . day of . . . ., and under the signature of . . . . publish and print a certain letter under the heading of . . . ., and in which letter is the following false, scandalous, malicious and defamatory paragraph, viz.:—(*here insert the words complained of*).

2. That the said newspaper is published in this city where your petitioner resides; that the defendant is domiciled in Port Louis, Mauritius, beyond the boundaries of this Colony, and beyond the jurisdiction of this Honourable Court; but he is at present in this city, having arrived to-day by the mail steamer from England: he is, however, leaving by another steamer for Mauritius which is advertised to sail to-morrow afternoon, he having a through ticket from England to

Mauritius by the same line of steamers, and has engaged his passage by that steamer.

(NOTE.—*Where the plaintiff cannot swear so positively as here as to the defendant's leaving, and how, but only can give his belief, he should give the grounds of his belief.*)

3. That by reason of the said libel I have sustained damages to the amount demanded as aforesaid, and that my claim is worth to me more than £15 sterling.

4. That I have no mortgage, pledge, or security for my said demand, or for any part thereof, and that the said amount remains wholly unsecured to me.

Sworn at . . . .
this . . . . day of . . . .
Before me,
. . . . . .
J.P.

Writ of arrest for libel.

(Heading.)

We command you that you take A.B. of Port Louis, Mauritius, but at present in this city, and safely keep him, so that you have him before our Justices of our Supreme Court of our said Colony at Cape Town on the . . . . day of . . . . ; then and there to answer C.D. of this city ; and to shew cause why he hath not paid him the sum of £ . . . . sterling which he owes to, and unjustly detains from him, as and for compensation in damages sustained by reason of the following false, scandalous, malicious and defamatory words in a certain letter signed . . . ., and published by the said defendant under the heading of . . . . in the . . . . newspaper of the . . . . day of . . . . viz. :—the words (*here put in the words complained of*) ; as it is said ; and have you then and there this writ with whatever you have done thereupon.

Witness, &c.

Affidavit to arrest for slander, under the 8th Rule of Court.

(Heading.)

I, A.B. of . . . . make oath and say :—

1. That the said defendant is indebted to me in the sum of £ . . . . sterling, as and for compensation in damages sustained by reason that he did, on the . . . . day of . . . . at . . . . and in the presence and hearing of . . . . and others, utter, speak and publish of and concerning me the false, scandalous, malicious, and defamatory words following, viz. :—(*here insert the words complained of*).

2. That I am resident in this city, and the defendant till recently resided at . . . . in the district of . . . . ; that I became aware of the slanderous words complained of only this morning on hearing that the

defendant is about to leave the Colony for good; that I annex hereto the affidavit of . . . . stating the defendant has sold off all his stock and farms and is on his way now to Johannesburg in the South African Republic, beyond the jurisdiction of this Honourable Court, where he intends to be domiciled in future and to carry on the business of broker and general speculator, which information I verily believe to be true.

3. That by reason of the said slanderous words I have sustained damages to the amount demanded, and that my claim is worth to me more than £15 sterling.

4. That I have no mortgage, &c.

(*Conclude same as last affidavit.*)

Sworn at . . . ., &c.

Writ of arrest for slander.

(Heading.)

We command you, &c. (*follow last writ*), damages sustained by reason of the false, scandalous, malicious and defamatory words following (*here give the words*), uttered, spoken and published by him the defendant on the . . . . day of . . . ., at . . . ., and in the presence and hearing of . . . . and others.

As it is said, &c.

Affidavit to arrest a captain of a ship, under the 8th Rule of Court for short delivery of cargo, &c.

(Heading.)

I, A.B. of . . . . make oath and say:—

1. That I annex hereto a bill of lading signed by . . . ., master, or captain, of the ship . . . ., acknowledging to have received on board his said ship in good order and condition certain (*here briefly describe the goods mentioned in the bill of lading, for instance*) 20 packages of glass shipped on board his said ship at . . . . on the . . . . day of . . . ., which said ship was bound for this port and arrived here on the . . . . day of . . . .

2. That the said defendant has discharged 10 out of the 20 packages of glass; that the 10 packages so discharged are all more or less broken and unmerchantable; and that he has failed to discharge and cannot deliver the remaining 10 packages; and that the said defendant is unable to account for the short delivery of the remaining 10 packages, while he attributes the damage of the other 10 to the perils of the seas.

3. That the freight on the said 20 packages due to the said defendant amounts to £. . . . sterling, which amount I have tendered to him on getting delivery, in good order as shipped, of the said 20 packages.

4. That the defendant has advertised to leave this port for . . . . to-morrow afternoon, as from the advertisement in the . . . . newspaper of to-day, will appear, and which is hereto annexed; and that I verily believe the said defendant will sail by the time mentioned in the said

advertisement; and that if he does so sail without being arrested, I shall have no means of securing from him the amount or value of the goods consigned to me as per the said bill of lading, or of any part thereof.

5. That the said goods when shipped on board the said ship were worth the sum of £ . . . . sterling; and that in this country, when duly delivered in good order, are worth the sum of £ . . . . sterling, and that the defendant is, therefore, in debt to me in the value of the goods at this port, amounting to the said sum of £ . . . . sterling, apart from any question of damages by reason of his bad delivery, or short delivery, or non-delivery.

6. That I have sustained damages in the said sum of £ . . . . sterling by reason of the bad delivery of some and non-delivery of the remainder of the said goods; and that my claim is worth to me in more than £ . . . . sterling.

7. That I have no mortgage, &c.

Writ of arrest of a captain of a ship for short delivery of cargo, &c.

(Heading.)

We command you that you take A.B. in his capacity as captain or commander of the ship . . . . now lying in the Robinson Docks, Cape Town, if he be found in this Colony, and safely keep him, so that you have him before our Justices of our Supreme Court of our said Colony at Cape Town on the . . . . day of . . . ., then and there to answer C.D. of . . . ., and to shew cause why he hath not delivered to the said C.D. certain goods shipped on board said ship in good order and condition at . . . . on the . . . . day of . . . ., as per bill of lading signed by the said captain on the . . . . day of . . . ., or in default thereof to pay the value thereof, the sum of £ . . . . sterling; the said plaintiff hereby offering and tendering, on delivery of the said goods in terms of the said bill of lading, to pay the freight thereon, the sum of £ . . . . sterling.

As it is said, &c.

Affidavit to arrest by a person in his representative capacity, under the 8th Rule of Court.

(Heading.)

I, A.B. of . . . . make oath and say:—

1. That I am the (*here describe the capacity, for instance*) trustee of the insolvent estate of C.D. of . . . .; and that it appears from the books of the said insolvent that E.F. of . . . . is indebted to him in the sum of £ . . . . sterling for (*here describe for what, as for instance*) certain one hundred bags of potatoes sold and delivered to him on or about the . . . . day of . . . ., and which I verily believe to be true.

2. (*The rest as in other affidavits to arrest, &c.*)

Circuit Court writ of arrest.

(Heading.)

We command you that you take A.B. of . . . ., if he be found within the jurisdiction of the ensuing Circuit Court for the district of . . . ., and safely keep him, so that you have him before our Judges of our Circuit Court, for the District of . . . ., of our said Colony of the Cape of Good Hope, to be holden at . . . . on the first day of the sitting of the said Court at nine o'clock in the forenoon, then and there to answer C.D. of . . . . and to shew cause why (*here state the cause of action, same as in Supreme Court writs*) . . . . which the said defendant refuses to do; and the said plaintiff prays that the said defendant may be adjudged to (*here state the prayer of your action, as for instance*) pay the said sum; as it is said: and return you then and there this writ and summons with whatsoever you have done thereupon.

Witness:—The Honourable . . . . one of the Judges of the Supreme Court of our said Colony at . . . . the . . . . day of . . . . in the . . . . year of our reign.

. . . . . .
Plaintiff's Attorney.

. . . . . .
Resident Magistrate.

NOTICE TO THE DEFENDANT.

Take notice that you are at liberty, either personally or by your attorney or agent, at any time not later than three days before the day specified in the annexed summons and writ for your appearance before the next Circuit Court, to enter your appearance with the Clerk of the Resident Magistrate for the District of such Court, and thereupon to confess, or deny, the claim or demand of the said plaintiff, and that you may then make and state to the said clerk any claim which you have against the said plaintiff; and that if you shall then confess to the said Clerk the whole claim or demand of the said plaintiff, and shall not make any counter-claim against him, it will not be necessary for you to appear before the Circuit Court, either personally or by your attorney or agent; and final judgment will be given against you by the said Court according to such your confession.

Dated at . . . . this . . . . day of . . . .

To

A.B.
the above Defendant.

. . . . . .
Plaintiff's Attorney.

Petition for discharge from arrest by reason of insolvency (§§ 22 & 23 *Insolvent Ordinance*).

(Heading.)

1. That your petitioner was on the . . . . day of . . . . arrested at the suit of C.D. of . . . ., and was lodged in the gaol at . . . ., where your petitioner still is, and which arrest still subsists.

2. That on the . . . . day of . . . . the surrender of your petitioner's estate was duly accepted by the Honourable Mr. Justice . . . .

3. Wherefore your petitioner humbly prays that your Lordships may be pleased to discharge him from the said arrest, and to release him from his imprisonment; and your petitioner, &c.

(*Affidavit of Verification.*)

(NOTE.—*The party who obtained the arrest should give notice of this petition and application to the Court.*)

Dissolution of arrest by anticipation.

(Heading of case.)

Sir,—Take notice that application will be made to the Hon. the . . . . Court on . . . ., the . . . . day of . . . ., at 10 o'clock a.m., on behalf of the above defendant, and at which time you will be required to shew cause, if any, why the writ of arrest in this case, bearing date the . . . . day of . . . ., shall not be declared illegal, and be dissolved and be set aside on the grounds that (*here state the grounds on which it is asked to have the writ set aside, as for instance*) the affidavit on which the arrest is founded discloses no cause of action; and also that it is informal in that it does not state that the plaintiff has no security for his claim; and to shew cause, also, why you shall not pay the costs of this application.

Dated at Cape Town this . . . . day of . . . .

Yours, &c.

. . . . . .

Defendant's Attorney.

To

E.F., Esq.,
Plaintiff's Attorney.

(NOTE.—*Make short affidavit in support of the facts in this notice.*)

Another form by anticipation.

(Heading of case.)

Sir,—Take notice, &c. (*as above*) . . . ., on the ground that the cause is not an arrestable one, inasmuch as the defendant acted as the broker for one C.D. in the sale of the shares referred to in the said writ; and that in the broker's note he has disclosed his principal; and that nothing has happened to entitle the said plaintiff to arrest or to sue the said defendant.

And to shew cause also why, &c.

C. . . . . T., this . . . . day of . . . .

. . . . . .

. . . . . .

Defendant's Attorney.

To

. . . . . Esq.
Plaintiff's Attorney.

(NOTE.—*Make short affidavit in support of the facts in this notice.*)

Bail bond.

Know all men by these presents, That we, A.B. of . . . . and C.D. of . . . ., are held and firmly bound to E.F., Esq., High Sheriff of the Colony of the Cape of Good Hope, in the sum of £ . . . . sterling of lawful money, to be paid to the said High Sheriff, or his certain attorney, executors, administrators or assigns; for which payment to be made we bind ourselves and each of us for himself, in the whole, our and every of our heirs, executors and administrators firmly by these presents.

Now the condition of this obligation is such that if the above-bounden C.D. do appear by his attorney before the Supreme Court of the Colony of the Cape of Good Hope, on the . . . . day of . . . ., to answer wherefore he hath not paid to G.H. the sum of £ . . . . sterling for which he, the said C.D., has been arrested at the suit of the said G.H.; and also stand to, abide and perform the judgment of the said Court thereon, or render himself to the prison of the said Court in execution thereof, then this obligation to be void; otherwise to remain in full force.

Signed with our hands this . . . . day of . . . ., A.D. 19—.

(Sd.) A.B.
„ C.D.

Signed and delivered, being first duly stamped, in the presence of

(Sd.) E.F.
„ G.H.

I, ..., the within-named High Sheriff, at the request of G.H., the plaintiff within-named, hereby assign to him the within bail bond and all the benefit and advantage arising therefrom.

In witness whereof I have hereunto set my hand this . . . . day of . . . ., in the year of our Lord . . . .

. . . . . .

Signed and delivered by the within-named High Sheriff, in the presence of . . . . . .
. . . . . .

CHAPTER VIII.

WRITS OF EXECUTION.

A WRIT for the execution of a judgment or any decree of the Court may be defined as a

"judicial consequence of a judgment against a party to a suit, passed on his person or on his goods, in case he is unwilling or neglects to comply with the judgment."

It would be useless to have a judgment if it could not be enforced, and therefore the first consequence of it is that the parties are bound to comply with it. There are several ways of executing a judgment of a Court, according to its nature or terms.

1. In real actions, by placing the successful party in possession of the thing adjudged to him.[1]

2. In other cases where a person has been condemned to do an act or fact.[2] If he neglects or refuses to do so, the judgment may be by arrest, or for civil imprisonment, or for contempt of Court.[3]

3. In personal actions, when a person is condemned to pay a certain sum of money. This is to be enforced by a writ of execution against a person's goods; which is the subject of this Chapter.

By the law of the Twelve Tables the debtor was allowed 30 days to make arrangements for the payment of his debt in terms of a judgment, and if he did not do this he was after 60 days adjudged to his creditors. Justinian extended the time to four months, but in judgments for alimony no delay

[1] Regt. v. Deurwaarders, of 28th March, 1680, § 12; G.P.B., Vol. 3, p. 655.

[2] Jud. Prac., 3, 7.

[3] See Chapters hereon.

was allowed.[1] The ancient Romans did not trouble themselves much about the attachment of a person's goods in satisfaction of a judgment. They adopted a more speedy and, what was to them, a far more satisfactory remedy. They at once seized the debtor's person and made him a slave, or, in later times, made him bankrupt. The Roman judgment creditor had not to "ferret out" the debtor's goods, a proceeding which is becoming monotonous to our Cape creditor, who in most cases, when the Sheriff has made an attachment of movables, finds the goods claimed by a wife or child, or perhaps by some other relative or friend who before was not heard of; and everything then belongs to somebody else other than to the judgment debtor. To force such a man to insolvency is perhaps what he wants; to sue him for civil imprisonment is what he does not fear, and is, after all, in most cases of very little satisfaction to the creditor, who has to pay for his maintenance. The Roman system was thus, to the creditor, a less troublesome, less expensive, and more pleasing proceeding: *make* the dishonest debtor a slave, and leave *him* to "ferret out" goods to satisfy the creditor's judgment. This law was rarely enforced against the poor, honest debtor. It was principally meant for, and applied to, the dishonest one. By the Roman law, further, a person who became a bankrupt was also declared *infamous*, and it was to avoid this that the debtor would make every effort to pay his debt, or his friends would do it for him. But since the abolition of slavery, and a universal tendency at the present day to connive at the faults of the upper ten thousand, bankruptcy has become fashionable in some quarters, the former stigma of infamy being regarded rather as the hallmark of sterling repute, and the criminal punishments applicable under our present insolvent law seem to be reserved by indulgent creditors for His Majesty's humble and lowly subjects only. Thus the threat of being declared an insolvent has with some no longer a deterrent effect, but exerts rather a pleasant and soothing influence: the dishonest debtor even welcoming it. One such (and he was a big one) on being

[1] C. 7, 54, 3; D. 42, 1, 2; Gaius 3, §§ 78 and 79; Cicero Pro Quinct. §§ 8 and 19.

sympathised with one day, when his affairs were drifting towards the Insolvent Court, said—

"Oh, no! It is my *creditors*, not I, who deserve your sympathy. I shall be free from my debts, and from summonses, and writs, and pestering lawyers; while *they* will not only get nothing, but will have to pay heavy bills of costs to bring or to defend the actions that are sure to arise out of my affairs."

The Roman law was gradually ameliorated from the strict rule of making every debtor a slave forthwith on failing to pay a judgment; and from the time of Antoninus Pius judgment debts were enforced directly by the seizure and sale of the debtor's property by officials of the Court.[1] This principle has been incorporated into the law of Holland, adopted by us, which it is now the object of this Chapter to illustrate.

In the Placaaten of the 20th August, 1531, §§ 172–195, and of the 28th November, 1680, §§ 12–35,[2] we have the texts of the law of execution sales in general; and with the exceptions of a few instances as altered by us, they are still the foundation of our law. What these are will be seen further on. To facilitate the study of this subject I shall divide it into

1. The law affecting the execution of movable property only.

2. The law affecting the execution of immovable property only; and

3. The law applicable to both movable and immovable property.

(1.) *As to Movable Property.*—In Holland, when a writ was against a person's "goods," these included movables as well as immovables, though the former had first to be levied. With us, formerly, the writ was against the "movables," if there were any to be attached, *now* it is against the "goods and chattels." By the 36th Rule of Court, which authorises a writ to be issued immediately upon judgment being given, a person

"may, at his own risk or without any leave for that purpose, sue out one or more writs for the execution of any final sentence in his favour, and without any summons or resummons thereon, provided that no process

[1] Dig. 42, 1, 6, 2; and 42, 1, 31; C. 8, 23, 2.

[2] G.P.B., Vol. 2, p. 703, and Vol. 3, p. 655.

shall issue against the immovable property . . . . except when specially declared liable to sale, until the process against the . . . . movable property shall be returned, and (there is) not sufficient to satisfy the exigency thereof; or unless the Court is satisfied that the defendant has no movable property."

Though this Rule uses the term "movable" property, the Ordinance No. 37 of 1828, § 8, commonly called the Sheriff's Ordinance, uses alternately the terms "goods and chattels" and "movable property."

"Whenever, by any process of the Court, the Sheriff shall be commanded to levy and raise any sum of money upon the *goods and chattels* of any person . . . . the said Sheriff shall . . . . repair to his (the defendant's) dwelling-house, and there demand that so much of the *movable property* may be pointed out, etc. . . . ., to satisfy the exigency of the said process . . . ., and . . . . shall seize so much of the *movable property* of the said defendant. . . ."

It will be noticed from this section that while the Sheriff is *commanded* to levy a sum of money on the "goods and chattels" of the defendant (and this is also the language of the writ), he is by the same section also to

"*demand* from him that so much of the 'movable property' may be pointed out . . . . to satisfy the writ."

In this Ordinance the words "goods and chattels" are for the first time used in this Colony. It is a term borrowed from the English law, where the old Norman expression "goods and chattels"—*bona et catalla*—was the generic denomination of things personal as distinguished from things real of the English law.[1] As our form of writ does not contain the word "movable," a question might arise (though so far as I know it has not yet arisen—certainly it has not come before the Court) as to *what* is meant by the term "goods and chattels"; and whether it means the same thing as the term "movables" in the Dutch law. Hitherto it has been popularly believed to be the same thing, and acted upon as if such. But if the question were to arise we should have to ascertain *what* was the English law, and what was included in or excluded from that term at the time we adopted it in

[1] Coke upon Littleton, Vol. 1, Chap. 5, p. 286, and Vol. 2, Chap. 1, p. 118; Stephen's Com., Vol. 1, p. 2, Ed. 5.

this Colony in 1828. The writs in our Resident Magistrates' Courts are directed against the "movable property" of the defendant.[1]

In a writ for "goods and chattels" it is not necessary to specify what goods and chattels are to be attached, but in such a writ it is at the option of the party condemned to point out what goods and chattels he wishes to be first attached and sold. If he fails to do this when requested thereto, or is not on the spot, then the Sheriff may attach what goods and chattels of the party he pleases, to satisfy the writ; and if sufficient goods cannot be found or pointed out to satisfy the judgment, the Sheriff should certify accordingly; and where no goods are found or pointed out he should make a return of *nulla bona*. And upon a return of not sufficient goods, or of no goods, the plaintiff may take proceedings against the defendant, either for civil imprisonment or to have his estate placed under compulsory sequestration.[2] But if the writ commands (which can be by only a special order of Court) that specific goods and chattels shall be attached, then the condemned party is not asked to point out those goods or any others, but the Sheriff makes the attachment without any reference to him or any interference or choice on his part.[3] These general principles are the same also under Magistrates' Court writs against movables.[4]

If the goods and chattels attached do not realise sufficient to meet the exigency of the writ, and the party who obtains the judgment subsequently discovers or hears of further goods of the condemned party liable to attachment, he is entitled to issue a further, or as we call it in practice, an "*alias writ*," for the debt or balance, to satisfy the writ; and so on from time to time he may issue further writs, thereafter called "*pluries*" writs, in succession, whether the goods have been concealed or not, or which from time to time may have come into the possession of the defendant; and so on, so long as he shall discover goods to be attached, until the original

[1] Act 20 of 1856, Rules 40–44 to Schedule B.

[2] See Insolvent Ordinance, and Ord. No. 37 of 1828.

[3] See also Wassenaar, Chap. 22.

[4] Act 20 of 1856, §§ 12, 14, 16, 23, 26, 27, and Rules 52–55 to Schedule B.

claims, with all subsequent charges and expenses thereon, shall be fully satisfied.[1]

On whatever property of his tenant or sub-tenant a landlord has a lien for rent a seizure may be made thereof, by a writ, in satisfaction of the judgment; or before judgment the property may be arrested in satisfaction of rent.[2]

"Money," though a movable, cannot be attached, if in the hands of a third party, without a special order of Court, on the ground, I presume (for there is really no other reason for it), that the party in possession may have a good claim to it or a set-off, and that it is difficult to prove the *jus in re* in money; but if the money is found in possession of the defendant, and there is no question as to its being his, say on his person, or in his safe, or on his counter, or in his drawer, there is nothing to prevent its being arrested by virtue of a writ of "movables" or of "goods and chattels." This latter point has not yet been decided in this Colony.[3]

"Outstanding debts," like money, cannot be attached without a special order of Court.[4]

Upon delivery of a writ to the Sheriff for movables he must within a certain specified time, according to the distance and the district in which the defendant resides—but within twenty-four hours after the receipt thereof, if the defendant resides in Cape Town or in the district thereof—repair to the dwelling-house of the defendant, and there demand that goods be pointed out to satisfy the writ; and whatever goods he finds, whether they are pointed out to him or not, he must attach, take possession of and make an inventory of.[5] But if the defendant will undertake, in writing, together with a surety, that the property attached shall be produced on the day of sale, the Sheriff may leave the property on the premises. If he will not do so the Sheriff can either remove the property or keep possession of it on the premises at the

[1] For Magistrates' Court writs, see that Act, § 14.

[2] *Scheuble and V. d. Berg* vs. *Durham*, 1 M., 537; *Crowly* vs. *Duminy*, B. 1869, p. 205; *Ulrich* vs. *Ulrich's Trustees*, 2 J., 319; *Lazarus* vs. *Dose*, 3 J., 42; *Smith* vs. *Dierks*, 3 J., 142; *Domisse* vs. *Theart*, 4 J., 92.

[3] Compare references in Chapter "*Arrests*"; and also Rule of Court 15, § 7; Ord. 37 of 1828; and since then see *McIntosch* vs. *Botha*, 13 C. S., 8.

[4] *Eilenberg* vs. *Jacobson & Co.*, 5 C. T., 1.

[5] Instruc., V. d. Hooge Raade, Arts. 163, 176; Loenius, 38.

expense of the defendant; and such property shall be sold, after being twice advertised in the *Gazette*, after the expiration of fourteen days from the seizure, or after a longer time, if necessary, according to the distance of the place where the property was seized. There is no compulsion to advertise a sale of movables in any local paper; but as to do so would be to the interest, rather than to the detriment, of the sale, no objection can be made to it. If any property attached shall be claimed by anyone, the plaintiff must indemnify the Sheriff, in writing, against any loss or damage; and if he declines to do so the Sheriff can release the property.[1] By the Roman law every movable thing of the debtor could be attached, excepting slaves, oxen, or implements of agriculture;[2] but with us the Sheriff cannot attach the necessary tools, utensils, implements, or cattle used in trade or husbandry, or wearing apparel of any person, *unless there shall not be sufficient other movable property to satisfy the writ.*[3] A Printing Press and materials have been held to come under "Tools of Trade."[4] And in England a Sewing Machine has been held to be a tenant's tool of trade.[5] But the poor lawyers do not enjoy the same temporary privileges as the carpenters, and the farmers, and the traders. Their tools or implements—pen, ink, and paper, and it may be also a few old Ordinances and a meagre collection of Law Books—are not exempted from the Sheriff's inventory. The general principles here laid down apply also to the writs out of the Magistrates' Courts, but the wearing apparel and bedding of the defendant, as well as his tools and implements of trade to the value of £5 on the whole, cannot be attached or sold under Magistrate's judgment,[6] and the Magistrate's messenger must realise immediately on the expiration of the fourteen days, unless by special authority of the execution creditor, or when the delay is unavoidable.[7]

[1] See also *Owen* vs. *Vigors*, B. for 1874, p. 141.

[2] C. 8, 17, 7.

[3] §§ 8, 9, and 11 of Ord. 37 of 1828; Rules of Court 145 and 146; Act 17 of 1886, §§ 6 and 7; *Dersley* vs. *Wagner*, 5 E.D.C., 248; and *Allen* vs. *Crosley and Holland*, Ibid, p. 260.

[4] *Storm* vs. *Breda and De Lima*, 1 M., 476.

[5] *Masters* vs. *Fraser*, 75 L. T., 611.

[6] Act 20 of 1856, §§ 15, 28, and Rules 42 to 47.

[7] *Hill* vs. *Van der Byl*, B. for 1869, p. 126.

All sales of movables by the Sheriff are for cash. If, then, the Sheriff, instead of claiming cash, sells on credit, he does so at his own risk; because on the return day of the writ the money should be ready to be handed to the plaintiff. It may be inferred, from Section 11 of the Ordinance, that the sale is to be for cash; but if this Section be not clear enough, the said Placaat of 1680 has specially enacted that such a sale should be for cash.[1] The sale under a Magistrate's Court writ must also be for cash; or, as the rule says, for "ready money."[2]

If a judgment of an inferior Court other than a Magistrate's Court has to be executed in another district than that where the judgment was given, a process in aid from the Supreme Court is required.[3] In the case of *Hyam's Trustees* vs. *Randiess*,[4] the Supreme Court held that a Judge of the High Court of Griqualand sitting at Kimberley has no jurisdiction to issue process of execution on an unsatisfied judgment of that Court against property situated elsewhere than within the jurisdiction of that Court, though he purports to do so as a Judge of the Supreme Court. But a Magistrate's Court writ, which can apply only to movables, can be executed in another district upon the Magistrate of the latter district countersigning such writ.[5] But the fact of it being countersigned by the latter Magistrate does not deprive the jurisdiction of the former in an interpleader action.[6]

When a fine is imposed on a person in any of the superior Courts for "contempt of Court," the writ is also against his "goods and chattels," but instead of allowing the Sheriff 24 hours, as on other writs, it is to be executed *immediately*.[7] But a fine for contempt of Court under a Magistrate's judgment is to be in the alternative of imprisonment on non-payment.[8]

(2.) *As to Immovable Property.*—An execution sale of landed property in Holland must have been a tedious process. Van der Linden[9] gives an elaborate account of all the pro-

[1] See also Van der Linden, Laws of Holland, 3, 7, § 9.
[2] Rule 47 to Schedule B.
[3] See Chapter "*Process in Aid.*" Rules of Court 186 and 189; *Snyders* vs. *de Villiers*, 1 M., 128; Merula 4, 97, 1; and Hol. Con., 4, 269.
[4] 3 C.T., 221.
[5] Act 20 of 1856, § 13.
[6] *Van Wezel* vs. *Foster*, 4 J., 382.
[7] Rule of Court 219.
[8] § 54 of Magistrates' Court Act.
[9] Jud. Prac., Vol. 2, Bk. 3, Chap. 6.

ceedings, forms and ceremonies to be gone through before the property was finally sold and transferred to the purchaser; and Van Alphen[1] adds to the agony. For my purpose I shall mention only what is of importance now to our practice.

The only historical point worth mentioning is, that when the bidding was about to begin a small wax candle was lit, and whoever was the highest bidder at the moment it was burnt out was provisionally declared to be the purchaser. I say, *provisionally*, because, as the sale had afterwards to be ratified by the Court, on the breaking of the seals of the Commission to sell anyone who advanced a higher price or offered better terms was declared the purchaser. It may seem strange to some of us at the present day, and it may perhaps be regarded as ridiculous or superstitious, that a candle should be lit and the sale declared complete only on its burning out. But it is not so, if considered in the light of ancient legal history. It was enacted by the Roman law that a contract of sale might be entered into provisionally, or on the happening of a certain event, or to take effect from a certain time, *addictio in diem*.[2] This law was adopted in Holland, and, in the execution sales of landed property, it was enacted that they should be completed on the burning out of a wax candle.[3] But why burn a candle? Why not use any other sign? The answer to these questions I cannot find, nor do I like to make a conjecture, especially in legal matters. But as the bids offered had to be open, and everyone present knew, at every advance, who was bidding and for how much, there was no chance for a dishonest Deurwaarder (or "an auctioneer") to make or take sham bids, to the injury of the purchaser, or hurriedly to knock down property cheaply to a favoured friend, to the detriment of the seller.

But even our own execution sales of immovable property are not free from ceremonies for which no reason can be assigned to-day. For instance, who can say why the Sheriff should fix "a price of the property below which it shall not be sold, and keep it sealed and secret from all persons!"[4]

[1] Papegaai, Chap. 30.
[2] Dig. 18, 2, 1.
[3] Placaat, 20th March, 1680, and Grotius 3, 14, 31.
[4] Rule of Court 113.

Whatever might have been the reason when this Rule was passed (in 1843), no one knows it now. It may thus happen that in the sale of the smallest piece of landed property, of however little value, and perhaps the only immovable property of the defendant (an erf was thus once sold for 4*s.* 6*d.*), all the ceremonies and delays under Rules 105–122 must be gone through; while movable property, to any extent and value, may be sold in the ordinary and usual way, without such elaborate ceremonial.

By the Roman law animals and movables had first to be exhausted before any recourse could be had to the sale of landed property.[1] It is the same with us when the plaintiff has no hypothec or pledge. But when property has been specially mortgaged that property must first be sold in execution before any other can be taken; and only for the deficiency can other property be taken. And in the attachment of such other property the Sheriff is bound to take what the defendant wishes to be sold first; but if the defendant fails to point out any such, or does not point out sufficient, the Sheriff must first take the smaller and what is of least importance. Thus he must begin with small houses, instead of selling large or portions of large ones; and only when all these fail can he take the largest or indivisible properties and buildings. This was enacted in the interest of the defendant himself, who, it was presumed, would prefer the less valuable things to be sold first. Of course, if he points out to the Sheriff the larger ones to be sold first, this can be done; but he cannot point out unmortgaged property, or property mortgaged to another party, to be sold to satisfy the debt of a plaintiff on property specially mortgaged. The property specially mortgaged must first be sold.[2] But it frequently happens that the bond specially mortgaging the landed property contains also a general clause against all the movables. Where this is so—and it is frequently done here—the writ may be issued either against the movables alone, or only against the immovable specially hypothecated property, or against both at the same time; and in the latter case

[1] D. 42, 1, 15, 8.

[2] Consult the said Placaaten, and also Hol. Con., Vol. 1, Con. 281, and Vol. 3, Con., 112.

the alternative may be given, that if the movables are not sufficient to satisfy the writ the specified immovables may then be taken.[1] But movables that are specially pledged to one creditor cannot be taken by another creditor by virtue of his general clause in his mortgage bond, or when he holds only a notarial general bond.

In Holland the writ was directed against "all the goods" of the defendant, and in attaching the Deurwaarder had to bear in mind the principles here laid down. With us, in practice, the writ is *general* as against the movables, but *specific* as against the immovables. Of course, when the writ is against movable property arrested by an order of Court the writ is specific also as against those goods. The plaintiff's attorney should thus instruct the Sheriff in terms of the principles here laid down. But even in movables not specially or generally pledged the defendant is entitled to point out which shall be sold first; and it is only on his refusing or failing to do so, or if he is not there to do so, that the Sheriff can take first what is of least value, and so on with the rest, till the writ and costs are satisfied.[2] If the plaintiff wants property mortgaged to him to be declared executable at once, he should claim it in the summons; the clause is,

"and also to shew cause why the property specially mortgaged by the said bond shall not be declared executable for the sum demanded."[3]

But supposing that the judgment is not against the immovable property, then the writ must first be issued against the movables; and it is only on failure of these to satisfy that judgment, or if there is sufficient proof before issuing writ that there are not enough movables to satisfy the judgment, then a writ can be issued for the immovable property.[4]

When a person has only a personal action for the possession or custody of a thing, or a *jus ad rem* to immovable property, he cannot treat that thing or property as if he had

[1] *Eager and others* vs. *Denyssen*, 2 S., 140.

[2] Regt. of 1680, Art. 15, 21, 25, and 31; Hol. Cons., Vol. 2, Con. 29, n. 3; Neostadius, Case 52; Merula 4, titles 95 to 98; Wassenaar, 22, n. 22; Jud. Prac., 3, 6, 4; Van Alphen, Vol. 1, p. 452 *et seq.*; Instruc. v. d. Hooge Raaden, Art. 173, 190 and 264 *et seq.* and De Academie, Chap. 37.

[3] Wassenaar, Chap. 22.

[4] Rule of Court 36.

a real right in it and attach that property by a writ alleged to be founded on a *jus in re*.[1]

The mode of attachment of movable property is by making an inventory thereof;[2] that of immovable property is to be "by notice 'in writing, served upon the owners or occupiers, and upon the Registrar of Deeds.'"[3] Upon the attachment of movable property a sale is at once advertised;[4] but on the attachment of immovable property the plaintiff's attorney shall deliver to the Sheriff an office copy of the process and return, together with the particulars of the property, to be obtained from the Registrar of Deeds Office; and thereupon the Sheriff shall ascertain the extent and particulars of the bonds on the property, and shall call a meeting of mortgagees to settle the conditions of the sale, which shall be open to the inspection of all concerned; and the property shall not be sold until after a reasonable time, according to circumstances, and until after advertisement in the *Gazette* and any of the local newspapers—the day of sale to be not less than a month after the attachment, unless otherwise ordered by the Court. Anyone who is dissatisfied with the conditions of sale, or who objects to the sale, can move the Court; and the sale is subject to the approval and confirmation of the Court. After the sale the Sheriff must frame a plan of distribution and rank the parties in the order of preference; from this there is also an appeal to the Court. The expenses of the sale are all to be borne by defendant, and any surplus is to be paid to him.[5] If the landed property should not realise the amount secretly reserved by the Sheriff[6] there is no sale; and there is no local provision what is to be done then. In former instances the point has been smoothed over by some arrangement or other being made with the creditor with the knowledge of the debtor, and the sale has been confirmed by the Court at the figure lower than the reserved amount by the Sheriff; but of late the practice has been for the High Sheriff, after inquiry, specially to

[1] *Maynard* vs. *Gilmer's Trustee*, 3 M., 116.

[2] Instr. v. d. Hoove, arts. 163–176, and § 8 of Ordinance 37 of 1828.

[3] Instr. v. d. Hoove, arts. 179–189, and Rule of Court 363.

[4] Act 17 of 1886.

[5] Rules of Court 105–122 and 363–369, and § 12 of Ord. 37 of 1828; *Jamieson* vs. *Kettles*, 3 E.D.C., 183.

[6] Rule 113.

report to the Court on the subject, and, if the Court is satisfied that no better offer is likely to be made, to confirm the sale and the Sheriff's report.

The transfer of landed property sold in execution must be passed by the Sheriff, not the debtor, to the purchaser.

(3.) *As to both Movable and Immovable Property.*—A writ may be issued by the party in whose favour the judgment is immediately upon the delivery of the judgment or decree. There is no interval necessary, as in Holland, between the judgment and the issuing of the writ. But the Court has the discretion to stay or not the execution where an appeal has been duly lodged; and in the case of an appeal no execution can issue without leave of the Court;[1] so also in the Magistrates' Court Act, 20 of 1856, § 33; and Rule 34 to Schedule B.[2] And in case of a judgment which has become superannuated no writ can be issued till the sentence shall have been revived. But the mere issuing of a writ and not acting upon it till its final determination is to be regarded as if it had never been issued; and after six years the sentence would become superannuated and must be revived before a fresh writ can be issued.[3] So also where the Sheriff has made the attachment, whether of movables or immovables, but, for whatever reason, does not proceed with the sale, the sentence must after six years be revived, and the Sheriff can then proceed with the sale in execution without a fresh attachment.[4] A defendant may, however, agree, in writing, in order to suspend the execution of the writ against him for a time, to waive the right of the effect of the superannuation, in which case the sentence will become interrupted and cannot be superannuated. This waiver should be filed with the Registrar of the Court before the sentence is put into execution.[5]

A defendant cannot postpone the execution of a judgment by offering security; he must comply with the order of Court, unless indeed the plaintiff chooses to grant time or to delay the execution.[6]

[1] Rules of Court 36 and 37.

[2] See Chapter "*Appeals.*"

[3] *Savings Bank* vs. *Maritz*, decided Nov., 1891, not reported.

[4] *Savings Bank* vs. *Botma*, decided December 1891, not reported.

[5] Neostadius 38; and *Bank of Africa* vs. *Kimberley Mining Board*, 2 A., 6; and see Chapter "*Superannuation.*"

[6] Neostadius, 57.

A writ against two or more defendants must be executed in terms of the judgment; and unless the judgment defines the share to be paid by each, then, though each is in the first place liable for his *pro rata* share, yet if, after excussiòn, there is a deficiency by one or more, the other or others must make good the amount. If the judgment is "jointly and severally" against the defendants, the writ may be issued against the property of one or all for the whole amount of the judgment. The nature of the sentence, whether provisional or final, should be stated in the writ, because if the defendant intends to go into the principal case, after execution, and notifies it, an extra sum of one guinea must be levied, to meet the costs of the security bond *de restituendo.*[1]

No limit of time is fixed for the return day of the writ; it may be very long, but it should not be too short. This must depend upon the locality and the whereabouts of the movables or the situation of the immovables. A reasonable time must, however, be allowed, in the case of movables, to advertise and sell the property and have the money by the return day of the writ; and, in the case of immovables, to attach and call the meeting of creditors by the same time. If the return day is fixed at too long a time the plaintiff has cause to complain, and if fixed at an inconveniently short time the Sheriff can insist upon longer time, and the plaintiff's attorney will have to get the time extended. But if the latter is content, as is frequently done, to leave the sale to the discretion of the Sheriff, and not to demand the money on the return day of the writ, then there will be no necessity to extend the writ in case of the money not being there by the day fixed. But the attachment should be made before the lapse of the return day in the writ. If, however, the writ is to be extended after attachment, or after return date, it cannot be done by the parties without an order of the Court.[2] It is sometimes cheaper and more expeditious to issue an *alias* writ than to apply for an extension of time on an existing writ. It is a matter in which the plaintiff's attorney must

[1] See Form of Writ, and of the Restitution Bond; and see also Magistrates' Court Rule 28 to Schedule B.

[2] *Meyer* vs. *Pohl*, 1 M., 498; *Allen* vs. *Crosby and Holland*, 5 E.D.C., 260; *Cholwick* vs. *Penny*, Ibid., p. 270; *Oudtshoorn Municipality* vs. *Du Preez*, 1 J., 195.

exercise his discretion as to which will be more beneficial to his client and less expensive to his opponent. It is nevertheless a common practice in the Registrar's Office to allow an extension of the return day of the writ *where nothing has been done upon it before the return date*, and the period is still within the superannuated period; but this is not by virtue of any law or decision, but rather on the ground that as the writ has not yet been acted upon the return day may be altered then, as it might have been altered when the writ was presented to be issued. As no one is injured by it, and the defendant rather benefited, there can be no objection to it, and no harm can be done by it. But no one else can extend the return day of a writ when once it is issued.

In the case of a superannuated sentence no writ can be issued till the sentence shall have been revived.[1] And in case either party to the suit dies, or becomes insolvent, the writ cannot be issued till his representative's name is placed on record.[2] The defendant is never served with a copy of the writ.[3] A judgment against a woman for her debts before her marriage can be executed against her husband and against all his goods after marriage, if they are married in community of property; and this against his movables as well as against his immovables, and without having his name placed on record, or any preliminary proceedings taken against or notice served on him.[4] This is confirmed by all subsequent writers and decisions to the present day; but judgment against a husband cannot be executed against the separate property of the wife, though the debt may have been incurred by the husband for his wife and family.[5]

Where goods, movable or immovable, have been specially arrested by an order of Court, though before judgment obtained, they can be attached and sold to satisfy such judgment without any application or reference to the defendant.[6]

No writ can be issued for costs until they shall have been duly taxed. The *allocatur* of the taxing officer shall be

[1] See Chapter "*Superannuation.*"
[2] See Chapter "*Actions.*"
[3] Regt. of 1680, art. 13.
[4] Decision of the Supreme Court of Holland of the 28th May, 1599, Case No. 244.
[5] *Smith* vs. *Dewdney Brothers*, 4 E.D.C., 21, and see Chapters "*Civil Imprisonment*" and "*Arrest.*"
[6] See Chapter "*Arrests.*"

sufficient guidance to the Registrar of the Court to issue a writ for costs, without requiring proof that the opposite party has had notice of taxation. If an attorney wants to issue a writ against his client for costs there should first be due notice of taxation given.[1] Nor can a writ for costs *de bonis propriis* be issued unless there is a special order to that effect.[2]

As a general rule the party in whose favour the writ is takes only so much of the proceeds of the sale of the goods or property attached as will satisfy his claim with costs. To this rule there is the exception that, if another creditor issues a writ within ten days of the former, they must rank *pari passu* on the proceeds and claim their *pro rata* shares.[3] This applies to movables as well as to immovables when not pledged or unmortgaged. But when burdened with a duly registered bond the special pledge of hypothecation must first be satisfied, no matter when the writ was issued or if not issued at all; and when all bonds are satisfied then the rest of the proceeds of the property, movable or immovable, must be distributed among the writs issued within the time mentioned by the said Ordinance.[4] But if, before the proceeds of the sale have been paid over to the execution creditor, the defendant surrenders his estate as insolvent, then they must be paid into the estate, for the sequestration of an estate stays the execution of a judgment.[5] Nevertheless the trustee of the insolvent estate will have to rank, and distribute the proceeds so realised, in the usual order of preference in insolvent estates, as if no prior execution had taken place, because the attachment of property under an execution in itself gives no preference; nor does a judgment give preference. But execution costs are always preferent.[6]

If a judgment has been obtained against a person in his representative capacity the writ should be issued against him in that capacity, unless the Court otherwise specially directs or makes him personally liable on action brought.[7]

[1] See Chapter "*Costs.*"
[2] See Chapter "*Costs.*"
[3] Ord. No. 3 of 1844.
[4] See also *re Woods*, 3 M., 114; *Jamieson* vs. *Kettles*, 3 E.D.C., 183.
[5] *Spiller and Smith's Trustees* vs. *Stewart*, 3 S., 364.
[6] See Chapter "*Costs,*" and § 22 of Insolvent Ordinance.
[7] *Wood & Co.* vs. *Flockmasters' Association*, 1 R., 91; *Wehmeyer* vs. *Trustee of Steyn*, B. for 1874, p. 46; *Brink q.q. Breda* vs. *Voigt and Breda*, 1 M., 537.

But when a judgment has been given against persons trading together in partnership, and the writ also so issued, the Sheriff may nevertheless under such writ attach the goods of any one of the members of the firm without any previous order of Court.[1] This applies to movables as well as to immovables, though by custom a writ against immovables must specify the property to be attached. A writ can also be issued against property vested in the Government: and the property, if movable, in respect of which the action has arisen must first be taken in execution, and this failing, then others, according to the same principles here laid down as regards private individuals.

Goods which cannot be arrested cannot be taken in execution.[2] A judgment given against a person in his lifetime cannot, in case of his death, be executed till his executor's name shall first be placed on record, and even then not till after the lapse of six months from the date of the executor's letters of administration, unless an order of Court is obtained for that purpose.[3] But if a writ has been issued in his lifetime and he dies during its operation, then it can be executed and carried out without waiting for the lapse of the six months from the date of the executor's appointment.[4]

A writ cannot be issued against an award of arbitrators so long as the award has not been made a Rule of Court.[5]

As a general rule a writ should be issued out of the Court that pronounced the judgment,[6] and in the case of an appeal, out of the Court where the appeal was heard.[7] But in the case of an appeal to the Privy Council the writ on that judgment should be issued out of the Supreme Court.[8] And in an appeal from a Magistrate's Court to a higher Court the writ may be issued out of either Court.[9] A provision is also in force that a writ may be issued out of the Supreme Court

[1] *Theunissen* vs. *Fleischer, Wheeldon, and Munnik*, 3 E.D.C., 291.

[2] See Chapter "*Arrests*."

[3] § 31, Ord. 104.

[4] *Van Reenen* vs. *Pearson*, 1 R., 236; *Du Toit and De Waal* vs. *Heydenrych and others*, 11 S. C., 197; and *Falconer* vs. *Drewitt*, 9 C. T., 546.

[5] Wassenaar, 27, §§ 7 and 8; Merula 1, 7: 1 and 2: and 4, 93, 7, 5, 11; De Academie, Chap. 37.

[6] Kersteman, Chap. 37.

[7] See Chapter "*Appeals*."

[8] Charter of Justice, § 52.

[9] *Soeker Brothers* vs. *Hamly*, 3 C. T., 357, and see Chapter "*Appeals*."

on a sentence obtained in a Circuit Court, but not till the Records of the case shall have been filed with the Registrar of the Court.[1]

A writ may be set aside by giving due notice thereof to the opposite party, and by setting forth the reasons or grounds upon which it is sought to set it aside. Good grounds, satisfactory to the Court, must be assigned; and these must depend upon the circumstances of each case.

Anything that can be the subject of commerce can be attached by a writ, whether it is movable or immovable, or whether there is a doubt or controversy under which head it comes, and whether it be a right in existence or a future right, so long only as the future right is certain. A person may have a future right to a thing, but he cannot claim it until after the lapse of a certain time or event or, as it is technically called, the *dies cedit* and the *dies venit.* If he has the *dies cedit*—that is, if his right to the thing has already vested, though his claim to its use and possession is postponed—he can do with that right what he pleases, subject to the conditions of the *dies venit,* and whatever rights he has are vested also in his creditors, upon insolvency, or in execution; as, for instance, in the case of a *fidei commissum* present or future, and other rights by virtue of a will, and the like. If it is doubtful whether the right can be described as a movable or an immovable thing, a special order of the Court must be obtained to arrest the thing, or the right to it, as, for instance, usufruct, or a *fidei commissum,* present or future, a pension or salary, shares, scrip, bonds, or a ship; or debts due to the debtor.[2]

Crops on land, so long as they have not been cut, or as it is technically called "gathered," belong to the soil and are part of the immovable property, and cannot be attached under a writ of "goods and chattels"; but when once they are cut or gathered, though still lying loose on the land, they become a movable, and can be attached under such a writ.[3] The rule is the same as regards the "usufruct" of land,

[1] Rule 189.

[2] Hol. Con., Vol. 3, Cons. 29, 104 and 120; Merula 4, 95, 7, §§ 3-6; and see Chapter "*Arrests.*"

[3] *Louw* vs. *Watermeyer, Trustee of Mostert,* 1 W., 36.

and where the defendant has only a usufructuary right in the land.

The Sheriff or his Deputy may sell by auction any property taken in execution without taking out an auctioneer's licence, and without being liable to an action for prosecution for the want of a licence.[1]

Besides the sum mentioned in the writ, and without any further instructions, the Sheriff must levy sufficient to satisfy all the costs and charges of the case, and all the expenses in and about the execution, the levy, and the sale, and the percentage chargeable thereon; and if there should be any surplus it must be paid to the defendant, who is entitled to an exact account, which account shall be liable to taxation by the taxing officer.[2] All sums levied or realised by the proceeds of movable property sold in execution must be paid to the Sheriff or to his Deputy, who settles with the plaintiff or his attorney and pays the surplus, if any, to the defendant.[3] But the proceeds of immovable property sold in execution must be paid to the Civil Commissioner of the Cape, Albany, or Kimberley, as the case may be, according to the Province in which the property is situated, and the money is to be paid out by such Civil Commissioner or on the order of the Sheriff or Deputy-Sheriff of such district to the persons entitled thereto.[4] So long as there are goods of the defendant that can be taken in execution he cannot be sued for civil imprisonment, but he should point them out, and not leave the task to the creditors or to the Sheriff.[5] Goods or properties in different districts must be attached by the Sheriff or his deputies in their respective districts.

If there are no buyers at a sale, or the goods cannot be sold, or no reasonable price be offered for them, whether through the chicanery of the plaintiff or of the defendant, or combination of parties, or for whatever good cause, then the Sheriff should not sell the property, but postpone the sale. (But see exception above mentioned, as regards landed property.) To do this can fairly be said to be in the interests

[1] Ord. 92 of 1832 and Act 28 of 1883, § 2, par. 5.
[2] § 11 of Ord. 37 of 1828.
[3] § 11 of Ord. 37 of 1828.
[4] Act 17 of 1886, § 9.
[5] Instruc. v. d. Hoove, art. 194; Merula, 4, 98, 1; and see Chapter "*Civil Imprisonment.*"

of the creditors as well as those of the defendant. The goods under such circumstances may be assigned to the creditor on a fair and reasonable appraisement to the extent of his claim, but the defendant may within two years thereafter release the goods on payment of the judgment with interest to date.[1] I have not been able to find any other authority in the Roman-Dutch law on this point. But the principle seems never to have been doubted, for though Merula's work was published in 1592, all the commentators since (the last of whom is De Haas, 1705) are silent on this point. The old English law was that the Sheriff was bound "to find buyers and return the money into Court." But this was overruled in the case of *Leader* vs. *Danvers*,[2] decided on the 27th November, 1798, in which the principle adopted was

"that when the goods are removed into the Sheriff's hands for want of purchasers, and if the plaintiff was dissatisfied with the result, the latter might set up a purchaser of the goods himself."

This decision was confirmed in the case of *Keightley* vs. *Birch and another*, decided on the 19th February, 1814, and is the last direct decision of the English Courts upon the point, though somewhat similar principles have been decided since. The Court held in the case here last-named that

"the Sheriff is not justified in selling the goods to the highest bidder greatly under their value, and if he cannot obtain a reasonable price he should make return that they remain on his hands for want of buyers, and that he ought to wait for *venditioni exponas*, the meaning of which is 'sell for the best price you can obtain.'"

These two cases accord with the general principles of Merula, whose doctrine applies to movable as well as to immovable property, though by our present local Rule the latter cannot be sold below a price to be previously fixed, and kept secret, by the Sheriff, except as hereinbefore stated.[3] Writs of Circuit Courts cannot be made returnable on any other day than the first day of the ensuing Circuit Court for the same district, unless another day be fixed by a Judge;[4] but writs of all other Courts may be made returnable without an order of Court on any day within reasonable time. "Interest" at

[1] Merula, 4, 96, and Dig. 42, 1, 15.
[2] 1 Bos. & Pul., 359.
[3] See Rules of Court 112, 113, and 114.
[4] Rule 167

6 per cent., unless otherwise mentioned in the judgment, can be claimed on a writ from the time mentioned in the judgment till the day of payment. If no time is mentioned the interest, if claimed in the summons, is payable from the date of the summons *a tempore moræ*, and, if not claimed in the summons, from the date of the judgment; but in all instances *till* the day of payment of judgment.[1] But in the Magistrates' Courts the interest is payable only *to* the day of the issue of the writ.[2]

The Registrar of every Circuit Court, on the close thereof, must transmit to the Sheriff a list of all writs of execution issued by him.[3]

If a defendant gives notice of his intention to surrender his estate as insolvent, it stops all execution sales, unless otherwise ordered by a Judge; and any proceeds already realised by a sale in execution, but not yet paid over to the plaintiff, must be paid to the trustee of the insolvent.[4]

The Sheriff or his Deputy would of course be liable in an action for damages for any wrong caused by him to any person.[5] But no action can be brought against him for any act of omission or commission in the execution of his office after six months from the date of such wrong complained of.[6]

The Sheriff's charges, and those of his Deputies or other officers, in the process of execution, are regulated by the 341st and 359th Rules of Court.

No writ of execution can be issued against an unrehabilitated insolvent in terms of the 127th section of the Insol. Ord. unless the Court shall be satisfied that the insolvent has assets to satisfy the writ wholly or in part.[7]

Writ of execution, against goods and chattels, on a provisional sentence.

(Heading.)

We command you, that of the goods and chattels of A.B. of . . . . you cause to be made the sum of £ . . . . sterling of lawful money, with the

[1] See Chapter "*Summonses*."

[2] Act 20 of 1856, Rule 27, to Schedule B.

[3] Rule 186.

[4] *Spiller, Smith's Trustees* vs. *Stewart*, 3 S., 364; *Re Buys*, 5 E.D.C., 247; Act 38 of 1884, § 2, and Act 17 of 1886, § 11.

[5] *Hill* vs. *Van der Byl*, B. for 1869, p. 126; *Olivier* vs. *Keating*, 1 F., 102.

[6] Act 17 of 1886, § 8.

[7] *Re Boltman*, 10 C. T., 367; Ibid, 17 S. C., 271.

interest from the . . . . day of . . . . to the day of payment, which C.D. of . . . ., by sentence of the Supreme Court of our said Colony, bearing date the . . . . day of . . . ., recovered provisionally against the said A.B., together with the sum of £ . . . . sterling and twenty-one shillings in addition in case the defendant shall require security "*de restituendo*" for the costs and charges of the said C.D. by him about his suit in that behalf expended, whereof the said A.B. is convicted, as appears to us of record; and have that money before the Justices of our said Court, at Cape Town, on the . . . . day of . . . ., to be rendered to the said C.D. upon sufficient security being given by the said C.D. for the restitution thereof, if in the principal case the said sentence be reversed. And have here this writ.

Witness, &c.

. . . . . .

Registrar of the Supreme Court.

. . . . . .

Plaintiff's Attorney.

(*Note.*—Any *alias* or *pluries* writ to be in a form similar to the form herewith, only inserting after the words, "We command you," the words, "*as before commanded.*")

Writ of execution on a final sentence.

(Heading.)

We command you, that of the goods and chattels of A.B. of . . . . you cause to be made the sum of £ . . . . sterling of lawful money, with interest, from the . . . . day of . . . . to the date of payment, which C.D. of . . . ., by sentence of the Supreme Court of our said Colony, bearing date the . . . . day of . . . ., recovered against the said A.B., together with the sum of £ . . . . sterling, for the taxed costs and charges of the said C.D. by him about his suit in that behalf expended, whereof the said A.B. is convicted, as appears to us of record; and have that money before the Justices of our said Court at Cape Town, on the . . . . day of . . . ., to be rendered to the said C.D.

And have then there this writ with whatsoever you have done thereupon.

Witness, &c.

Writ of execution against "goods and chattels" generally, and against "landed property" specially mortgaged.

(Heading.)

We command you, that of the goods and chattels of A.B. you cause to be made the sum of £ . . . . sterling of lawful money, with interest from the . . . . day of . . . . to the day of payment, which C.D. of . . . ., by sentence of the Supreme Court of our said Colony, bearing date the . . . . day of . . . . recovered provisionally against the said A.B., together with the sum of £ . . . . sterling, and twenty-one shillings in addition,

in case the defendant shall require security "*de restituendo*" for the taxed costs and charges of the said C.D. by him about his suit in that behalf expended, whereof the said A.B. is convicted as appears to us of record; and have that money before the Justices of our said Court at Cape Town, on the . . . . day of . . . ., to be rendered to the said C.D. upon sufficient security being given by the said C.D. for the restitution thereof, if in the principal case the said sentence be reversed. And if no goods and chattels be found, or not sufficient to satisfy the exigency of this writ, then we command you that you attach certain landed property by the above sentence specially declared executable, which property is described as follows:—(*for instance*) a certain farm called . . . . situate in the district of . . . . in extent . . . . morgen . . . . and . . . . roods, more fully described in the deed of transfer of the said A.B. dated the . . . . day of . . . .

And have then there this writ with whatsoever you have done thereupon.

Witness, &c.

Writ of execution against immovable property only.

(Heading.)

We command you, that you attach the farm . . . ., situate in the district of . . . ., the property of A.B. of . . . . more fully described in the deed of transfer in his favour, bearing date the . . . . day of . . . . And which said farm was by sentence of the Supreme Court of our said Colony, bearing date the . . . . day of . . . ., specially declared executable to satisfy the sum of £ . . . . sterling of lawful money, with the interest thereon at the rate of . . . . per cent. per annum from the . . . . day of . . . . to the day of payment which C.D. of . . . ., by the said sentence, recovered provisionally against the said A.B., together with the sum of £ . . . . sterling, and twenty-one shillings in addition, in case the defendant shall require security "*de restituendo*" for the taxed costs and charges of the said C.D. by him about his suit in that behalf expended, whereof the said A.B. is convicted, as appears to us of record: and have that money before, &c. (*Conclude as in other writs in provisional sentence cases.*)

Writ of execution against money arrested.

(Heading.)

We command you, that of the money in the hands of the . . . . Bank to the credit of A.B. of . . . ., arrested at the suit of C.D. of . . . . by order of this Honourable Court on the . . . . day of . . . ., you attach the sum of £ . . . . sterling, which the said C.D., by sentence of the Supreme Court of our said Colony, bearing date the . . . . day of . . . ., recovered against the said A.B., with the interest thereon from the . . . . day of . . . . to the day of payment, together with the sum of £ . . . . sterling, being the taxed costs and charges of the said C.D., &c. (as above).

Writ of execution against movables specially pledged.

We command you that you attach certain (here describe them; for instance) 12 leaguers of wine, 13 hogsheads of brandy, in the store, No. . . . ., Burg Street, Cape Town; and 14,000 sheep, 150 horses, 36 oxen, 2 wagons, 3 carts in the custody of A.B. on the farm . . . . in the district of . . . ., all the property of C.D. . . . . of . . . . . : and which property, goods and articles were specially pledged by C.D. to E.F. of . . . . by bond bearing date the . . . . day of . . . . for the sum of £ . . . . sterling, and for which said sum the said E.F. has obtained judgment against the said C.D. on the . . . . day of . . . . in our Supreme Court, with the interest thereon at . . . . per cent. from the . . . . day of . . . ., together with the sum of £ . . . . sterling for the taxed costs and charges of the said E.F., &c. (as above).

Writ for costs only.

(Heading.)

We command you that of the goods and chattels of A.B. of . . . . you cause to be made the sum of £ . . . . sterling, being the taxed costs and charges incurred by C.D. of . . . ., in and about a suit wherein he was the (plaintiff), and the said A.B. was the (defendant); and which said costs the said A.B. is by sentence of the Supreme Court of our said Colony, bearing date the . . . . day of . . . ., condemned to pay, as appears to us of record; and have that money before the Justices of our said Court, at Cape Town, on the . . . . day of . . . . to be rendered to the said C.D.

And have there this writ.

Witness, &c.

. . . . . .
Registrar of the Supreme Court.

. . . . . .
Plaintiff's Attorney.

Circuit Court writ of execution.

(Heading.)

We command you that of the goods and chattels of A.B. of . . . ., you cause to be made the sum of £ . . . . sterling, with interest thereon from the . . . . day of . . . . to the day of levy, which C.D. of . . . ., in our Circuit Court holden in and for the district of . . . . in this Colony, on the . . . . day of . . . ., before the Honourable E.F., one of the Judges of our said Colony, recovered provisionally by a sentence of our said Circuit Court against the said A.B., together with the sum of £ . . . . sterling, for the costs and charges of the said C.D. by him about his suit in that behalf expended, whereof the said A.B. is convicted, as appears to us of record. And have you that money before the Justices of our Supreme Court, at Cape Town, on the . . . . day of . . . . next, to be

rendered to the said C.D. upon sufficient security to be given by the plaintiff, for the restitution thereof, if in the principal case the said sentence be reversed.

And have then there this writ.

Witness: the Honourable E.F., one of the Judges of our said Colony at . . . . the . . . . day of . . . .

. . . . . .
Registrar of Circuit.

. . . . . .
Plaintiff's Attorney.

Notice of motion for the release of goods wrongly attached on the ground that they do not belong to the defendant.

(Heading.)

A.B. *vs.* H.I., in his capacity as the High Sheriff: and C.D. & E.F.

Gentlemen,

Take notice that this Honourable Court will be moved on . . . . day of . . . . at 10 o'clock in the forenoon, on behalf of the above applicant, for an order discharging the attachment of certain 10 horses, 50 oxen, and 20 she-asses, made by the said Sheriff on the . . . . day of . . . . last past by virtue of a writ of execution against the goods and chattels of the said E.F., in pursuance of the judgment of this Honourable Court given on the . . . . day of . . . . in a suit wherein the said C.D. was plaintiff and the said E.F. was the defendant, on the ground that the said animals are the *bonâ fide* property of the said applicant, and that the said defendant has no ownership whatever in them.

And further why you shall not be ordered to pay the costs of this application.

Cape Town . . . . day of . . . .

Yours, &c.

. . . . . .
Applicant's Attorney.

To H.I., C.D., & E.F.
the above Respondents.

Affidavit in support.

(Heading as above.)

I, A.B., of . . . ., make oath and say:—

1. That on the . . . . day of . . . . the High Sheriff attached certain 10 horses, 50 oxen, and 20 she-asses, by virtue of a writ of execution directed against the goods and chattels of E.F. of . . . ., in a suit wherein the latter was the defendant and C.D. of . . . . was the plaintiff.

2. I say that the said animals are mine and never were the property of the defendant. That owing to the drought in the month of . . . . last, on my farm . . . . in the district of . . . ., where the animals used to run,

I had made an arrangement with the defendant that if he would allow me to graze the said animals on his said farm, during the months of . . . . and . . . ., I would in return allow him to graze all his cattle, whatever number he may have, during the winter season on my said farm, as owing to the severe frosts and cold weather his farm is unsuited for cattle in winter.

3. That in pursuance of this arrangement I sent the said animals to his said farm in charge of a herd, who was also to look after them there, but that after a few days the herd deserted, and on my offering to send another herd the defendant said it was not necessary as the animals could run with his cattle.

4. I say, lastly, that I have done nothing, and that nothing has happened, to deprive me of the ownership in the said animals, and that they are not liable to be attached in the said suit.

Sworn, &c.

Another: to set aside the attachment on the ground that the animals have been duly pledged.

(Heading.)

Follow the previous notice to the end of the words "on the ground," and then proceed, "that the said animals have been duly pledged by "virtue of a certain notarial bond by the said E.F. to the said applicant, "passed before the Notary Public . . . . on the . . . . day of . . . . for the "sum of £ . . . . sterling, which said bond has been duly registered, and "the animals were duly delivered to the said applicant, who has ever "since retained possession thereof."

And further, &c.

Affidavit in support.

1. Take clause 1 of previous affidavit.

2. That on the . . . . day of . . . . the said E.F. passed a notarial bond before the Notary Public . . . . in my favour for the sum of £ . . . . sterling, being for (*state cause of debt, for instance*) money lent and advanced to him, for the security of which he pledged the said animals and on the same day made delivery thereof to me, and I have ever since retained possession of them.

3. That when the said Sheriff attached the said animals they were on my farm . . . . in the district of . . . . and in my lawful possession.

4. That the said bond is still unpaid and that until it is paid the animals are not, under the circumstance hereinbefore mentioned, liable to attachment at the suit of another party.

Sworn, &c.

(NOTE.—*The following Instructions and Conditions of Sale I obtained from the High Sheriff.*)

Instructions to be observed by Commissioners of the Court in selling real property under attachment. (Rules of Court 112 *et seq.*)

1. The selection of the auctioneer rests with the Commissioner. If there is no auctioneer available the property may be sold by the Commissioner himself, or by some one in his presence or under his instructions.

2. The annexed are the detailed conditions which should be read out at the opening of the sale.

3. The remuneration of the auctioneer is one per cent. on the purchase price if there is a sale with a minimum of £1 1*s.*; or such sum as is payable by established local custom if there is no sale, not exceeding £1 1*s.*

The Special Commissioner is entitled to a fee of from £1 1*s.* to £3 3*s.* (according to the magnitude of the sale) and travelling expenses on the public service scale if the sale is held in the country.

4. The reserve price (Rule 115) must on no account be opened until the biddings are closed.

5. If the highest bid exceeds the reserve the bidder should (unless he elects to pay cash) be required to sign the conditions of sale with his sureties.

The conditions should be stamped with a 2*s.* stamp (payable by the purchaser) as an act of suretyship.

6. If the highest bid is below the reserve price, the bidder should be asked whether he desires his bid reported for acceptance by the plaintiff and the Court. If he does, he and his sureties should sign the conditions of sale.

7. The conditions when signed should at once be returned to the High Sheriff, together with all the documents which have been forwarded to the Special Commissioner for the purposes of the sale.

8. The purchaser may if he wishes pay cash. If he does the amount should forthwith be deposited in the Standard Bank to the credit of the High Sheriff "for transfer to Cape Town," and the duplicate deposit receipt forwarded to the High Sheriff.

9. If there is a house on the property sold, the purchaser's attention should be called to the condition requiring him to insure it.

10. The purchaser should be informed that he must obtain transfer through Messrs. . . . ., the Government Attorneys, Cape Town, to whom should be sent the receipts for transfer duty, quitrent and arrear Divisional Council rates.

11. In order to facilitate the payment of transfer duty the declaration of seller should be made at once by the Special Commissioner before whom the sale is held and handed to the purchaser or his agent. No power of attorney to effect transfer is necessary.

12. Receipts for all payments made locally should be forwarded to the High Sheriff's office.

13. The Special Commissioner and the auctioneer are both prohibited from purchasing at these sales.

Conditions of Sale.

1. The highest bidder to be the purchaser, subject to the reserve price affixed under the 113th Rule of Court; and if any dispute arise as to any bid the property to be put up again.

2. The purchaser shall pay 2 per cent. Government and Auctioneer's dues in cash. He shall also pay 4 per cent. transfer duty, the expense of the deeds of transfer and mortgage, stamps, and any other expenses necessary to complete transfer, including all arrear rates due.

3. The purchase money shall be paid at the Sheriff's office, Cape Town, in . . . . instalments, ... months respectively from the day of sale, together with interest thereon at 6 per cent. per annum.

4. Immediately after the property is declared to be sold the purchaser shall either pay to the . . . . the whole of the purchase money, together with the 2 per cent. Government and auction dues, or otherwise produce two sureties to the satisfaction of the . . . ., who, together with the purchaser, are to sign the conditions of sale, and to bind themselves as sureties for the due payment of the purchase money, with the interest thereon in the manner above mentioned; failing which, the property will be put up again at the expense and risk of the defaulter.

5. After payment of the first instalment of the purchase money, the transfer shall be effected in due form to the purchaser, and at the time of the transfer the purchaser shall pass a bond specially hypothecating the property for the residue of the purchase money with interest, and shall also insure the property for not less than . . . ., and shall cede the policy.

6. The property is sold as represented by the title deeds and diagram, the Sheriff not holding himself liable for any deficiency that may be found to exist, and renouncing all excess. The property is also sold subject to all servitudes and conditions specified in the deed of transfer.

7. The property to be at the risk of the purchaser from the time of sale.

CHAPTER IX.

ON CIVIL IMPRISONMENT.

CIVIL imprisonment may be defined as the confinement of a person in a public gaol for not paying a judgment debt or any other sum of money he is ordered to pay; or for not doing any other act, thing, or deed ordered by the Court.

It is divided into two kinds: (1) Where a person is condemned to pay a certain sum of money, by way of debt, damages, or costs; and (2) where a person is ordered to debate an account, to settle, to deliver, to render something, or to do any other act, fact, thing, or deed ordered by the Court. This is technically called *ad præstandum factum;* and its refusal may also be regarded as a "contempt of Court," in which case it becomes criminal.

Before discussing the practical effect of these two kinds of orders it will be necessary, so as to present the whole subject in one view, briefly to state the history of civil imprisonment, and the sources from which our law thereon is derived.

From the earliest period of the world's history the creditor seemed to say to his debtor what he still, subject to certain conditions, says to him to-day, "your money or your body"; and therefore the rule, from of old, came to be established that "whoever has no money or goods must suffer in his body," as "otherwise," say some later writers, "those who had not would freely commit all kinds of roguery."[1]

Thus by the Mosaic legislation (from about B.C. 1491) the debtor was bound to sell himself as a bondsman to his creditor if he could not pay him, but he was to be released

[1] Loenius 94.

at the seventh year, or at the jubilee; and in the Sabbatical year there was a general remission of all debts, but this provision did not apply to a foreigner; and again in later times (from about B.C. 895) not only must the debtor, but also his children, serve the creditor till he was paid.[1]

But Professor van der Keessel says[2] "that justice is not administered in Holland according to the laws of Moses." This may be strictly true in the sense that the law of Moses has never been formally adopted in Holland, just as some writers on the English law say that "the law of Rome is not in force in England," because never formally adopted there; yet there are many instances where the law of Holland is the same as the law of Moses, and the law of England the same as the law of Rome. As the Mosaic preceded the Dutch legislation, and the Roman the English, we must conclude that both England and Holland, though they are too proud to admit it, have copied from, or have been very largely influenced or (if I may be pardoned the expression) have been wonderfully inspired by, the legislation of their predecessors named. But the law of Holland is admitted to be derived from, and for the greater part still is the same as, the Roman law; and though both England and Holland have, independently of each other, legislated upon the subject of civil imprisonment, they have sailed remarkably close to the law of the Twelve Tables, which, in turn, contain some of the very words of the Mosaic code. Thus both countries at one time had this law: "The debtor was formerly the bondsman, or slave, of his creditor," and he had to "work for his creditor till his debt was paid."[3]

The doctrine of the Roman law was that the debtor was adjudged to his creditor, whose slave he became, and who had the right of life and death over him. Aulus Gellius has described the process of enforcing a debt according to the law of the Twelve Tables.[4] But for the purpose of this Chapter it is unnecessary to go into the history, process, and

[1] Exodus xxi. 2; Leviticus xxv. 39–55; Deuteronomy xv. 1–12; and 2 Kings iv. 1.

[2] Thesis 4.

[3] See also Stephen's Law of England, Vol. 3, p. 681, Ed. 5; and Hunter's Roman Law, pp. 876–885.

[4] Gaius, by Tomkins and Lemon, 2, 27 and notes.

practical effects of the *Addictio, Nexum,* and *Manus Injectio,* to which the Roman debtor was subject. These terms are elaborately treated of under their proper headings by that eminent scholar the late Mr. George Long, in "Dr. Smith's Larger Dictionary of Greek and Roman Antiquities;" suffice it to say that the whole of the third of the Twelve Tables treats of civil imprisonment, and is as follows[1]:—

"1. In case of debt, either upon confession or judgment, the debtor shall have 30 days' grace.

"2. That term having expired, the plaintiff shall have the *manus injectio* (a species of *actio legis* or execution of final process) to bring the debtor before the Magistrate.

"3. If the debt is not paid, or (*vindex*) surety provided, the creditor shall take the debtor, put him in chains or into the stocks, the weight of the chains not to exceed fifteen pounds, but less at the creditor's will.

"4. The debtor shall be at liberty to live as he thinks fit, provided it be at his own expense. In the event of his being unable to provide his own nourishment, the creditor in whose custody he is shall supply him with at least one pound of bread daily.

"5. Provision relating (*a*) to the right of compromise; (*b*) to the debtor's captivity in default of compromise within 60 days, and to his production during this interval in the *comitium* on three successive market days, and the public declaration of the amount in which he was condemned.

"6. Provision allowing the creditor after the third market day, he not being paid, either to put his debtor to death or to sell him to any stranger resident beyond the Tiber, which, in the case of there being several creditors, enacts as follows: 'After the third market day, *his body may be divided.* Anyone taking more than his just share shall be held guiltless.'"

The meaning of the words *capite pœnas luito* ... and ... *partis secanto,* towards the concluding part of this third table, has given rise to much discussion among the writers on civil law. President Bynkershoek says these words "must

[1] A facsimile of the original may be seen in Merula 4, 98, 1, 4. The translation here given is from Ortolan's History of the Roman Law, p. 105.

be understood differently from, and in a softer sense than, the meaning generally ascribed to them by the ancient civilians," and a host of eminent writers agree with him. He says that "the creditors were entitled to divide, not the body, but the price of the insolvent debtor."[1] But this opinion cannot be reconciled with the obvious meaning of the words, and if we bear in mind that in the early days of Rome the debtor might be compelled to work out his debt or be adjudged a slave, and that slaves could be put to death at pleasure by their masters without any lawful cause or trial, or sold into a foreign country, in order, as was alleged, that the city might be freed from them; or that if the debtor had several creditors he was adjudged to them all, and if they could not agree as to the division of labour of the debtor's person there was no possible means of settling their conflicting claims except by the division of the body among them, and that the strict letter of the law certainly allowed him to be cut in pieces by his creditors and his body to be shared between them in proportion to their debts; that the Romans had no prison for debtors, but every creditor was his own gaoler; (indeed we have it on the authority of Livy[2] that Appius Claudius, one of the Decemvirs, had a prison specially constructed for his debtors): I say that if all these things are borne in mind, it is not inconsistent with the history of the period when the Twelve Tables were written, and with the spirit of the old Roman law upon this point, that the debtor's body should be cut into pieces to satisfy the demands of his unrelenting creditors.[3] That we find no case recorded of such an incident as to the actual cutting up of the debtor's body among his creditors is no justification for the view held by those writers who side with Bynkershoek.

In course of time, however, the master's power of life and death over those who became his slaves was taken away and the condition of the slave was very much ameliorated, but otherwise the rights of creditors over the persons of their debtors remained as established by the Twelve Tables.[4]

[1] Obs. Jur. Rom. I, I.

[2] 3, § 57.

[3] See also the article "Civil Law," by the late George Long, in the Encyclopædia Britannica.

[4] Consult Gibbon's Decline and Fall of the Roman Empire, Chapters 2 and 44.

But even in Holland, in early days, the debtor was handed over to his creditor, who detained him until he had paid his debt. The Counts of Holland from time to time, between the years 1245 and 1412, issued charters or mandates (handvesten) upon the subject of the imprisonment of debtors in their respective towns, but all more or less in the same terms as that of Count William II., who on the 28th January, 1252, granted a charter for the city of Dordrecht, in which are these words: "*If the debtor has nothing wherewith to pay (his debt) we ought to hand his person to his creditor.*"

Two years later, namely, in 1254, the same Count granted a charter for Alkmaar, in which appears the following clause, and which was generally adopted by the other cities and states, and thus became the law of the whole of Holland:—

"... that if the debtor against whom there is a judgment cannot pay his creditor, the judge condemns him into the custody of the messenger (of the Court) for two weeks, and during that time he is to be fed by the messenger, and after the two weeks the judge condemns him into the hands of his creditor, who is to feed him but not to do any injury to his body, and who shall retain him till he shall have paid him, or till he shall be released by his creditor."[1]

According to this charter the creditor had and retained the custody of his debtor, and of course could confine or detain him where he pleased, which was generally in a private house. It was not till the year 1510 when, owing to the great abuse till then obtaining of the practice of confining debtors in private dwellings selected by the creditor, this law was altered; and it was enacted, and several times thereafter renewed, that without any exception, whether rich or poor, whether for arrest or civil imprisonment, the defendant shall at once be sent to the castle, or prison of the Court, which in later times was called the "debtors' prison."[2] With us, in this Colony, the place of confinement is called the "Debtors' Ward," and is in the public gaol where the defendant has to be incarcerated.[3]

But the shifting of the debtor from the creditor's own

[1] Regtsgeleerde Observatien, Vol. 2, Obs. 100; Gul. Grotii. Isag., 1, 7, 24.

[2] Placaaten of 17th July, 1510, G.P.B., Vol. 3, p. 653, § 39; and of 13th October, 1747, Vol. 7, p. 934.

[3] See also Ord. No. 24 of 1847.

private prison to the public gaol, though it was clearly to the advantage of the former, did not alter his liability for the debt, or the period of the imprisonment. The advantage he gained was a more regular and certain supply of food, freedom from punishments and hardships at the hands of his creditor, and freedom from work while in the public gaol; whereas while in the power of his creditor he had to work for him and thus reduce his debt.[1]

In addition to the charters above mentioned of 1252 and 1254, we have the following:—By the instructions of the Court of Holland of 30th August, 1531,[2] it was decreed that if the defendant failed to "satisfy a judgment," he was to be apprehended and taken to the nearest town, or other secure place, and there to be detained "by the order and at the cost of the plaintiff." By the Ampliatie of the Court of 21st December, 1579,[3] it was decreed that "*the defendant shall remain in prison till he shall have fully satisfied the plaintiff.*" By the instructions of the Hooge Raade of the 31st of May, 1582,[4] "*the debtor shall remain in prison . . . till he shall have satisfied the plaintiff.*" By the Placaat of the 28th March, 1680,[5] the "*debtor shall remain in prison till such time as he shall have satisfied the sentence.*"

From these "Placaaten" and rules of Court it is clear that the debtor could not be liberated from imprisonment until he had fully complied with the sentence, including also, as was settled by decisions thereafter, all costs and costs of maintenance. In other words, the creditor had it in his power to detain the debtor in prison till his (the debtor's) death, for not paying a civil debt.[6]

In the beginning of the Christian Era, under Roman law, the debtor could not come out of prison till he had paid the uttermost farthing.[7]

It was the same, and to some extent even worse, by the law of England. There prisoners for civil debt were

[1] Peckius, 4, §§ 1 and 2.
[2] G.P.B., Vol. 2, p. 747, § 194.
[3] G.P.B., Vol. 2, p. 770, §§ 15 and 16.
[4] G.P.B., Vol. 2, p. 834, arts. 275, 276 and 277; and Vol. 5, p. 892, §§ 275 and 276.
[5] G.P.B., Vol. 3, p. 659, arts. 35 and 37.
[6] Consult Gul. Grotii. Isag., 26, 28, 29; and Wassenaar, 1, 23, §§ 1–9.
[7] St. Matthew v. 25, 26, and xviii. 30 and 34.

sometimes allowed to rot in the Fleet Prison for want of proper food, clothing and sanitary arrangements; and it was not till such novelists as Dickens and Reade, by their writings, roused the indignation of the British public on the subject that an amendment in the law of prison regulations was made and the condition of the debtor ameliorated, till ultimately, by the Debtors' Act of 1869, 32 and 33 Vict., chap. 62, as amended by the Act of 1878, 41 and 42 Vict. chap. 54, civil imprisonment was retained in only a few cases; or, as the late Sir George Jessel, Master of the Rolls, puts it—

"the Debtors' Act (1869), while abolishing the penalty of imprisonment for debt in case *of an honest debtor*, is intended for the punishment of a fraudulent or dishonest debtor, and is in this sense vindictive."[1]

The 4th section of the Imperial Debtors' Act of 1869 (it is needless to insert it here at length) mentions who can be imprisoned, but limits the imprisonment to one year even as to fraudulent or dishonest debtors; and the 5th section mentions others who may be imprisoned for a term not exceeding six weeks where the debt does not exceed £50. The English Courts, since the Imperial Act of 1878, will not grant an attachment where, to all appearances, imprisonment will not produce payment, and they will stay, in terms of that Act, the operation of any writ when there is proof the defendant cannot pay the money. Thus the law of England on civil imprisonment is at the present day, all things considered, more favourable to the debtor than the law of any other country where civil imprisonment is still in force.

By the preamble of the proclamation in this Colony of the 5th February, 1813,[2] it is admitted that

"there is no limited time for the duration of the imprisonment of any person . . . . for debts and costs, ... but such debtors are committed to prison till they can pay the debt, &c.;"

and it then proceeds to put a limitation to imprisonment for small debts, by declaring that for Rds. 50 (£3 15*s.*) the

[1] *Morris* vs. *Ingram*, L. Rep., 13, Ch. Div., 338.

[2] Statute Book, p. 45.

imprisonment shall not be longer than six months, and for Rds. 20 (£1 10*s.*) not more than one month.

This proclamation has not been repealed and is therefore still in force, but it may be said now to apply only to the higher Courts, as the Magistrates' Courts have been since created and are regulated by Act 20 of 1856. A judgment of the Magistrate's Court limits the period of imprisonment to one month where the debt and costs shall together amount to £5, but in no case whatever shall the imprisonment be for longer than three months.[1] We have thus this anomaly—that if a judgment is given against a defendant in a Magistrate's Court for, say £1 10*s.*, he cannot be imprisoned for longer than a month; if in any of the higher Courts the period of imprisonment is the same; but if for £3 15*s.*, the period of imprisonment ordered by the Magistrate's Court is still only one month, while by the higher Courts it is six months. If the debt be 1*s.* more, say £3 16*s.*, then there is no limitation to the period of imprisonment by a judgment of the higher Courts, while by the Magistrate's Court it is still only one month; and from £5 upwards to the utmost extent of a Magistrate's jurisdiction in a civil case—for instance, in provisional cases, £250—the period of imprisonment is limited to only three months.

Thus by the law of Holland, and so also in this Colony until the proclamation and the Act just mentioned, there was absolutely no limitation whatever to the period of imprisonment, however small the judgment debt might be, and so also was it in England till the Act of 1869.

Had then, it may be asked, a defendant no relief in cases where the period of imprisonment was unlimited? *No, not as a matter of legal right.* But to show how the operation of this rule was sometimes avoided, or suspended in Holland as well as in this Colony, not by legal compulsion or operation of law, but first by the favour of the State and afterwards by the Courts, I must go a little into history in order to present in one view the ancient and the modern practice, and thus, while proving the general rule, to shew the exceptions that are now sometimes allowed.

[1] § 20.

In the time of the Roman Emperor Augustus a law was introduced by Julian which had for its object the power to relax the rigour of the law of the Twelve Tables, by which the creditors became the masters over the persons of their insolvent debtors. This *lex* was called the *cessio bonorum*, and by this *cessio* the debtor could give up his property to his creditor. But by a constitution of Alexander Severus he was not released from his debt unless the creditors were fully paid, and whatever property he subsequently acquired was also liable to the payment of his old debts. So long as his debts lasted he had not the management or disposal of his own property; his creditors did this for him, allowing him only a little out of it sufficient to live on. He had this privilege, however, of not being imprisoned, and if imprisoned he could be discharged upon obtaining the benefit of *cessio bonorum*.[1]

The same doctrine, with a few practical variations only, was introduced into the law of Holland first by use and custom between the years 1462 and 1531, and afterwards, in order to remove any doubt on the subject, was determined by certain Placaaten.[2]

The granting of this *cessio* was at first an act of grace or favour of the sovereign, but afterwards lay in the discretion of the Court, which granted it upon application of the debtor before as well as after the judgment, and before as well as during the imprisonment; and the effect of it was an immunity from imprisonment, and if imprisoned the debtor was immediately released.[3]

Before the debtor's application could be entertained by the Court he had to call a meeting of his creditors, and exhibit to them a true statement of his affairs, and prove the real cause of his inability to pay. If this clearly arose from an unforeseen misfortune, disaster, or reverse, and it could be proved that he was not careless or negligent, and exercised

[1] Consult Cod. 7, 71, 1, and the references given in next paragraph but one.

[2] See Van der Linden's Verzameling van Gewysden, Casus 30.

[3] Instr. v. d. Hoove van Holland of 21st December, 1579; of 14th November, 1582; G.P.B., Vol. 2, p. 767, arts. 5 and 6, and p. 793, art. 23; of 2nd May, 1595; Ibid, Vol. 8, p. 706; and of the Ord. v. d. Hooge Raade, of 24th June, 1649; Ibid, Vol. 7, p. 936.

every precaution a prudent man of business would have done, it then became *discretionary* with the Court to grant or withhold his prayer for *cessio bonorum;* and if granted, curators were then appointed to take charge of his estate. In many cases this *cessio* could never be granted—as, for instance, when a person was condemned *ad praestandum factum*, or for any criminal act, or who had been guilty of any carelessness in the management of his affairs, or absconded, or for previous bankruptcy, or fraudulent dealings, &c.[1]

If, then, the debtor had no property, he could make no *cessio*, and if he came under the disabilities here mentioned he could not obtain the relief sought. Thus in either case he had to remain in prison. Then could not the defendant surrender his estate as insolvent? By the Roman law he could, but there was always a degree of infamy attached to insolvency.[2] By the law of Holland the right to surrender as insolvent was not introduced till some time after the introduction of the *cessio bonorum*, and by a Placaat of the Emperor Charles V., of 4th October, 1540,[3] bankrupts were compared to "public thieves, street disturbers, and enemies of the common weal"; and by the third section of that Placaat those who had "absconded or fraudulently made away with their property were accounted bankrupts, and were to be punished with death."[4] What with infamy, and being compared to thieves and enemies of the State on the one hand, and the fear of punishment of death on the other, insolvents had not such a convivial time of it in the "brave days of old" as at the present day.

The *cessio bonorum* was in force also in this Colony till 1843, when by the first section of the Insolvent Ordinance it was repealed, but the repeal was not to affect causes in which the *cessio* had already been granted. This Ordinance has now been adopted by, and is in force throughout, all the South African States.[5] What led originally to the repeal of the *cessio bonorum* in this Colony I have not been able to find

[1] Van Zurck, Codex Batavus, tit. "Cessie"; Loenius 94; Grotius 3, 51; v. d. Keessel, 883–886.

[2] Hunter's Roman Law, p. 876–885.

[3] G.P.B., Vol. 1, p. 311, § 2.

[4] See also Lybrecht, Vol. 2, Chap. 28, §§ 11–17; and Hol. Cons., Vol. 2, Con. 119.

[5] Buchanan's Insolvent Law, Prefatory Remarks.

out, but I believe this law is still in force in most of the Colonies having the Roman-Dutch law.

There is a popular impression that "surrender" has taken the place of *cessio bonorum*, and that by a debtor surrendering his estate as insolvent he is *ipso jure* freed from imprisonment. Not so. The acceptance of the surrender of an estate is purely in the discretion of the Court or a Judge,[1] and it is not usual with the Judges to accept a surrender where the debtor either has no property, or where, if he has some property, the surrender will not be to the benefit of the creditors. There have been a few exceptions, but they were in cases of very poor people who were in gaol, and where the plaintiff's conduct appeared vindictive. And even if a surrender should be accepted, that in itself does not discharge the debtor from imprisonment; it is still in the power and discretion of the Court, or Judge, to order, or to refuse to order, the release from gaol, or to put the defendant on terms:[2] and before the defendant can, under this section, apply for his release from prison, by reason of his surrender being accepted, he must give notice to the detaining creditor.[3] In the case of De la Cornellière[4] the full Court, while accepting the surrender of the defendant's estate, ordered his discharge from prison upon certain conditions, one of which was to find security to the satisfaction of the Master that he would not leave the Colony while his estate was under liquidation, and he had some trouble, and it took some time, before he obtained this security, during all which time he had to remain in gaol. And though a rehabilitation is a discharge from all debts contracted before a surrender, and thus from civil imprisonment for those debts,[5] yet where a person had been imprisoned for the deficiency of his estate, as appeared after the confirmation of his account and before his rehabilitation,[6] his rehabilitation was at first unconditionally refused, and after having been in prison for nine months he was rehabilitated and then discharged from gaol;[7] but a person

[1] §§ 2 and 128 of the Insolvent Ordinance.
[2] § 22.
[3] *Re Schenke*, B. for 1876, p. 8.
[4] Decided in 1865, not reported.
[5] §§ 120 and 123.
[6] § 124.
[7] *Hope* vs. *Brunette*, decided in 1868, not reported.

who has been convicted of fraudulent insolvency can never be rehabilitated.[1]

Since these enactments the law has undergone some further ameliorations. By our Magistrates' Court Act of 1856 these Courts have it in their discretion to entertain or not any fair and reasonable offer of settlement made by a defendant against whom a decree of civil imprisonment is sought, whether the plaintiff agrees to it or not; and should it appear that the defendant is incapable of paying or settling the amount, or any part thereof, the Court may withhold the decree of civil imprisonment.[2] But till the passing in this Colony of Act No. 8 of 1879 the higher Courts had no power to withhold the application for the decree of civil imprisonment for debt, unless the application was made against an insolvent by virtue of the 124th section of the Insolvent Ordinance for the deficiency in his estate. By the 6th section of that Act it is provided that

"no writ of civil imprisonment for non-payment or non-satisfaction of any judgment or decree shall be granted or issued by . . . . any . . . . Court in this Colony in cases in which the defendant . . . . shall prove to the satisfaction of the Court . . . . that he has not property or means sufficient to satisfy in whole or in part the said judgment or decree."

Thus, then, according to this section the application for civil imprisonment must, as a matter of course, be granted unless the defendant succeeds in satisfying the Court that he not only cannot now pay but has no prospect of paying even in part. No hard and fast rule can be laid down by the Court in a matter which is so much in its discretion, yet nevertheless it may be fairly stated that, as a general rule, where the defendant has a means of income out of which he is able to pay weekly, monthly, quarterly, or yearly, according to circumstances, a portion of his debts, the Court will, though granting the order for imprisonment, suspend the operation of the writ pending the periodical payments, with the condition added that, if he fails to pay any of them, he must go to prison. There are many cases confirming this principle which need not be quoted here, but the first which

[1] § 118. [2] § 19.

settled this point under the new Act was that of *Jones & Co.* vs. *De Possel Deydier*.[1]

As to the amount of the periodical payments, see some cases referred to further on under "Insolvency," where the principles are the same; but in the case here mentioned the defendant's salary was £3 a month, and the Court ordered him to pay £3 monthly, as he admitted that his wife paid the household expenses out of her own means.

Again, under this Act no period of imprisonment is fixed, but the Act enables the defendant, on the application for the decree of civil imprisonment, and thus before he is in gaol, at once to produce all the evidence in his power why he should not be sent to prison, instead of waiting, as formerly, during his imprisonment on the chance of getting his estate surrendered and being afterwards released from gaol.

But in two cases which came before the Supreme Court a power was exercised by the Court which has never before been exercised either in Holland or in this country, and which could be exercised in England only since the passing of the Act of 1878, 41 and 42 Vict., chap. 54, viz.: of suspending the operation of a writ of civil imprisonment, already in force, some time after the decree had been unconditionally granted. By the Magistrates' Court Act and the Act 8 of 1879 the Court on hearing the application for the decree of civil imprisonment can of course grant the order conditionally, but no provision is made, as in the Imperial Act, of suspending a writ once in operation for causes which should have been brought to the knowledge of the Court, but which the defendant failed to do on the hearing of the application for imprisonment. In the case of *J. Forde*[2] three decrees for civil imprisonment had some time previously on three separate actions been unconditionally granted against him. He applied for the sequestration of his estate, but it was refused. Subsequently he petitioned the Court to discharge the writs, on the ground that in consequence of the writs being out against him he was unable to leave his house,

[1] Decided in 1880, not reported. See also *Marriott* vs. *Haigh*, decided in 1892, 9 J., 501.

[2] Decided 20th November, 1885, not reported.

and that he could not get out to earn any money. The Court thereupon suspended the operation of the writs *sine die*, with leave to the creditors, to whose suit they were obtained, to apply again to the Court to have them put into operation on proof that the defendant had the means to pay the debts or some portion thereof. In the case of *Hartill*,[1] who was in gaol on a writ of civil imprisonment granted by the Magistrate's Court at Cape Town, he petitioned the Supreme Court to be discharged from prison on the ground that he had nothing. The Court, on referring the petitioner to the Magistrate's Court, confirmed the power of suspension after the operation of the writ, as they did in *Forde's* case, and the Chief Justice added :—

"The application should have been made to the Magistrate. He issued the order, and it was for him to decide whether the decree should be suspended or not. . . . . It appeared to him that a Magistrate, even after he had issued a writ, would have the power of suspending its execution when it was clearly shewn to him that the defendant had not the means to satisfy the writ, and that if the application was renewed he would make such order as he saw fit. . . . . Let evidence be given to the Magistrate that the man had no means, and let him exercise his own individual judgment whether the writ should be suspended, with leave to the plaintiff to have it put into operation again on proof that the man had the means to pay."

So, similarly, in the case of *H.* vs. *Bossi*.[2]

Thus on the application for the decree of civil imprisonment the defendant must satisfy the Court that he has nothing wherewith to pay: when once the order has been unconditionally granted, and the defendant subsequently obtains an unconditional order from the Court to suspend the operations of the writ, it is for the plaintiff to satisfy the Court, if he wishes the first decree to be revived, that the defendant has come into funds to satisfy the writ or a part thereof.

It may be urged that the decrees for civil imprisonment given in these two cases were by a Magistrate's Court, and not those of a Judge or a higher Court; but there is nothing

[1] Decided 27th November, 1885, not reported.

[2] 4 J., 72. See also *Field & Co.* vs. *Wernikoff*, 5 C. T., 26, and 12 S. C., 15; and *Haumer* vs. *De Villiers*, 10 C. T., 413.

in the Magistrates' Court Act or any statutory law regarding the power of suspension of an operative writ, and the Supreme Court laid down the doctrine generally and as being the common law.

If a party appeals from a Magistrate's judgment to a higher Court, it is in the discretion of the latter Court, on an application for a decree of civil imprisonment on the judgment not being satisfied, either to grant the decree, as usual, for an unlimited period of imprisonment and with the higher Court costs, or to limit it in terms of the Magistrate's Court Act with Magistrate's Court costs only, as the decree for civil imprisonment could also have been issued out of the Magistrate's Court.[1]

From the epitome of the history of the law of civil imprisonment here given it will be seen that, briefly summed up, the law with us now stands thus:—

(*a*) That as a general rule the period of civil imprisonment is unlimited. The exceptions are in cases of small debts mentioned in the Proclamation of 1813 and in the Magistrates' Court Act.

(*b*) That as the *cessio bonorum* is abolished, the debtor can no longer come under its benefits.

(*c*) That as a Judge, in the exercise of his discretion, may refuse to accept the surrender of an estate, the defendant, if in gaol, must remain there.

(*d*) That, though accepting the surrender of the estate, it is still in the discretion of the Court or Judge to refuse to order the defendant's release from prison.

(*e*) That, accepting the surrender and refusing to order the release, it still remains in the discretion of the Court to refuse thereafter to grant the defendant his rehabilitation, and he is still liable to remain in prison till he is rehabilitated: and where he has been convicted of fraudulent insolvency he can never be rehabilitated: and finally

(*f*) That the Court now may, in the exercise of its discretion, suspend absolutely or conditionally the operation of the writ of civil imprisonment, unconditionally granted.

[1] *Soeker Bros.* vs. *Humbly*, 3 C. T., 357; *Mostert* vs. *Ford*, 17 S. C., 256; *Sargent* vs. *Mansfield*, decided in 1902, not reported.

Under these circumstances the defendant's only chance of a favourable consideration of his case by the Court or by a Judge is to produce all the evidence in his power which may tend to satisfy the Court as to the justness of his cause, and to throw himself on the mercy of the Court. In the exercise of their discretion the Court or Judge will probably, and generally, lean to the side of mercy, to the liberty of the subject, and, having regard to all the surrounding circumstances of each particular case, to the equity of the defendant's case and position; but on the other hand the defendant's conduct generally towards his creditors or in the management of his affairs (as, for instance, fraudulence, gross carelessness, absconding, concealment of assets, and the like), may have been such as not to entitle him to any of these considerations, or to any sympathy at the hands of the Court; in which cases the ancient rule of "your money or your body" can still be suitably and justly enforced against him.

At the beginning of this Chapter I mentioned two kinds of civil imprisonment. I shall first of all briefly refer to the second to shew its close affinity to and difference from the first, but it nowadays more properly belongs to and is treated of under the heading of "*Contempt of Court.*"

There is a close similarity as to the mode of procedure between the two kinds of civil imprisonment in Holland, but there is a material difference as to the effect of the decrees or sentences upon each. These differences have never been observed by us in our practice, though why I cannot say; it will be unnecessary now to notice them here fully. It seems, however, that more indulgence was allowed by the Courts in granting the order for *præstatio facti;* also that they exercised a certain amount of discretion as to the period of imprisonment, or relaxation for certain hours from imprisonment, on such orders, and also that under certain circumstances an appeal was allowed from such a decree. But after the defendant had been imprisoned for a month on a *præstatio facti* order, it was in the discretion of the Court, on the application of the plaintiff, unless the defendant could satisfy the Court to the contrary, to put or assess a money-

value in favour of the plaintiff on the "act," or "fact" to be done by the defendant, and award the amount thereof to the plaintiff, by virtue of which the plaintiff might then detain the defendant in prison in the same manner as if the defendant had originally been a judgment debtor of his.[1]

Though we have several instances in this Colony where a defendant has been condemned *ad præstandum factum*, I know of no case, certainly there is none reported, in which the Court has assessed or put a money-value in favour of the plaintiff on any act or fact ordered to be done by the defendant; though there is no doubt whatever that this can be done. In the case of *Twentyman and another* vs. *Hewitt*[2] the Court ordered the defendant to enter into a notarial deed according to the articles of an antenuptial contract, and to carry out the provisions thereof; and in the case of *Manuel's Trustees* vs. *Norden*[3] the defendant was ordered to receive transfer and to fulfil certain conditions of sale. In both cases, the defendants failing to do what they were ordered by the Court, the plaintiffs sued them for civil imprisonment, in the same manner as is done on a judgment debt, and obtained judgments against them for not obeying those orders. In these two cases the money-value of the orders to be carried out was not assessed to the plaintiffs.[4]

This practice has, however, since these decisions (in 1833, 1837, and 1845), not again been resorted to, so far as I have been able to trace. A plaintiff has another and more speedy remedy, and instead of suing for civil imprisonment on a judgment *ad præstandum factum*, he applies to the Court for an order of personal attachment against the defendant for contempt of court in not obeying its orders. Thus, so far as regards the plaintiff, he has his satisfaction. If he does not get the assessed value of the judgment which, after all, is purely in the discretion of the Court, he will get the order for contempt granted him.[5]

[1] G.P.B., Vol. 2, p. 770, §§ 15 and 16, and p. 834, § 276; Ibid, Vol. 3, p. 655, §§ 36–39, Vol. 5, p. 892, §§ 275–277; *Orde op 't stuk van Justitie*, arts. 31 and 32; Merula 2, 7, 9 and 4, 95, 4; Van Alphen, Vol. 1, Ch. 31, p. 486–507; decision van 't Hof, No. 280; Jud. Prac. 2, 3, 7; and Loenius, 142.

[2] 1 M., 156.

[3] 3 M., 526.

[4] See also *Wolhuter* vs. *De Villiers and others*, 2 M., 37.

[5] See Chapter "*Contempt of Court.*"

In this Chapter, therefore, it will be found that I have treated more particularly of the decree of civil imprisonment under the first division, that is in so far as it concerns and is applicable to a judgment debtor.

The return of *nulla bona*, or "not sufficient goods," by the Sheriff on a writ of execution is sufficient *primâ facie* evidence that the defendant possesses no movable property, and therefore that he may be sued for civil imprisonment; and if he swears that he possesses such property he must prove it.[1] If, however, he can prove to the Court that though he has no movable he has sufficient immovable property after payment of the mortgage debts (if any) to meet the plaintiff's claim, the Court may suspend the decree for civil imprisonment, to await the result of the realization of immovable property; and so long, therefore, as the debtor can point out goods or any asset of any kind belonging to him sufficient to satisfy the judgment, he cannot be imprisoned for debt.[2] If, on the other hand, the defendant should fail to point out to the Sheriff all his disposable property, as it is his duty to do, and he cannot prove that that disposable property is sufficient to satisfy the debt to the plaintiff, then the decree for civil imprisonment must be granted.[3]

The process of execution against the person of a debtor is not issued as a matter of course in respect of a return of *nulla bona* to satisfy any judgment which has been obtained against him, but he must be summoned to shew cause why a decree shall not be granted against him for civil imprisonment by reason of the non-payment of the debt.[4]

The defendant must be summoned, and cannot be served with a notice of motion, for a decree of civil imprisonment.[5] The summons in such a case must be somewhat in the same form as a summons in a provisional sentence case, and must be made returnable also on a provisional day, and set down on the provisional roll; and, the proceedings being summary, it is disposed of by the Court at the same time and in the

[1] *Langeveld* vs. *Tyrholm*, 1 M., 314.
[2] G.P.B., Vol. 2, p. 747; Ibid, Vol. 3, p. 659, § 35; Vroman, 4, 3, § 3, n. 5, and Jud. Prac., 3, 6, 10.
[3] *Bergh* vs. *Stadler*, 3 M., 149.
[4] *Master of the Supreme Court* vs. *A. B.*, 3 M., 139.
[5] *Schutte* vs. *Wylde*, 1 M., 403, and *Dickson* vs. *Richardson*, 3 M., 146.

same manner as are other provisional cases. The summons must, *inter alia*, aver the judgment; that a writ had been taken out in execution of the sentence; and that the Sheriff had made a return thereof of *nulla bona*, or "insufficient goods," as the case may be.[1] If the plaintiff fails to appear on the summons it expires and the defendant must be summoned afresh.[2] On the return day of the summons proof must be exhibited to the Court that a judgment had been obtained for the debt or claim which then forms the subject-matter of the application for the decree of civil imprisonment, and that a writ of execution had been issued against the defendant, and that he had failed to satisfy it. For this purpose the record of the case should be produced, or certified copies, by the Registrar, of the judgment, writ, and return thereon, should be handed in to the Court. If the decree of civil imprisonment is applied for on a judgment of an inferior Court, the proper officer in charge of the original records of that Court should certify to the copy judgment, writ, and return.

In an unsuccessful application by plaintiff for a decree of civil imprisonment, with costs of *comparuit* to the defendant, the plaintiff cannot renew his application until he shall have paid the defendant those costs.[3]

With the copy-summons for civil imprisonment the defendant must be served also with a copy of the sentence, writ, and return thereon.[4]

When the plaintiff has obtained two separate judgments against two defendants, in two separate actions, though for the same debt, he cannot join them in one summons on an application for a decree of civil imprisonment.[5] When the judgment is larger than the debt or costs that the defendant may be entitled to set off against it, the decree for civil imprisonment must nevertheless be granted and the writ issued and enforced.[6]

[1] *Ingram and Bros.* vs. *Theunissen*, 3 M., 148.
[2] *Schutte* vs. *Wylde*, 1 M., 403.
[3] *V. d. Bergh* vs. *De Lima*, 3 M., 150.
[4] *Wolf* vs. *De Villiers*, 1 M., 24.
[5] *V. d. Bergh* vs. *Van Dyk*, 1 M., 126.
[6] *Trustees of Van Niekerk* vs. *Tiran*, 1 J., 358; and *Van Santen* vs. *Hopkins*, 3 J., 81.

Though the summons is in the form of a summons in a provisional case, and is placed on the provisional roll, the decree for civil imprisonment is not provisional but final, and immediately upon its being granted the writ for civil imprisonment may, without any notice or further delay, be issued and enforced for the defendant's attachment and imprisonment.[1]

Where a decree of civil imprisonment had been obtained in the name of a partnership firm, but before its execution one of the partners died, the decree was revived after special summons in the name of the surviving partner on the ground that, as the judgment was obtained by both members of the firm, the execution must also be in the name of both.[2] But this case was decided in 1834, and though the proceedings are not illegal, the practice of late years has been the cheaper and more expeditious one of applying to the Court, by notice of motion, for the substitution on record of the names of the deceased's executors, or even without such notice.[3]

Though a writ of execution cannot be executed upon a superannuated sentence until the sentence be revived, yet this does not apply to a decree of civil imprisonment, which may be granted and enforced at any time after the Sheriff's return of *nulla bona*.[4]

An appeal from a judgment is no bar to a decree of civil imprisonment being granted by the Court;[5] and as the granting of the decree of civil imprisonment at once, or withholding it pending an appeal from a judgment, is discretionary with the Court, the Court will not withhold the decree if the principle involved in the case is of no great importance or the appellant is not likely to be successful on the appeal.

Though a person in his representative capacity obtained a judgment against another, and in that capacity also issued the writ of execution, he might, in his private capacity, pro-

[1] Grot. Isag., 2, 8, 26.
[2] *Dickson* vs. *Richardson*, 3 M., 146.
[3] See Chapter "*Actions*."
[4] *Brink and another* vs. *De Villiers*, 3 M., 151; see Chapter "*Writs of Execution*."
[5] *Nisbet and Dickson* vs. *Richardson*, 1 M., 474, and *Hollis* vs. *Chase*, 8 J., 3.

ceed against him for civil imprisonment on the unsatisfied judgment;[1] and so also if the judgment was obtained against the defendant in *his* representative capacity and remained unsatisfied, a decree of civil imprisonment might be issued against him in his individual capacity.[2]

A surety who has paid the debt for which he became surety is entitled to sue the defendant for civil imprisonment;[3] and the defendants who become sureties, and as such have been ordered to pay the debt, may also be condemned in a decree of civil imprisonment;[4] so too can an acceptor of a bill of exchange be sued for civil imprisonment.[5]

If, for whatever cause—as, for instance, the removal of the defendant from one district to another out of the jurisdiction of an inferior Court which gave judgment against him—the sentence remains unsatisfied, he may be summoned in a higher Court for civil imprisonment on that judgment.[6] The decree of a Magistrate's Court, for civil imprisonment, cannot be enforced in another magisterial district,[7] but provisional sentence of a higher Court must be obtained on the judgment;[8] and in the same summons a decree should be asked for for civil imprisonment of the defendant. Such a decree can be given effect to at once without first issuing a writ of execution.[9]

The writ for civil imprisonment, whether against a person who has or who has not surrendered his estate as insolvent, may be made returnable on any day in or out of term, as after the arrest and imprisonment of the debtor no further proceedings are taken on such a writ.

By the Roman-law a woman could not be imprisoned for debt,[10] but she may be by the Roman-Dutch law, and so with us;

[1] *Duqui* vs. *Bergh*, 3 M., 146.

[2] G.P.B., Vol. 3, p. 659, § 36; V. d. Linden, Law of Holland, 3, 1, 9, 15, and his Jud. Prak., 3, 7; Van Alphen, Vol. 1, Chap. 31; but for the more modern practice herein see Chapters "*Contempt of Court*" and "*Writs of Execution*."

[3] *Schmitz* vs. *Olivier*, 3 M., 151.

[4] *Wolhuter* vs. *De Villiers and others*, 2 M., 37.

[5] *Mocke* vs. *Van Breda*, 2 M., 229.

[6] *Muter* vs. *Satchwell*, and *Ley* vs. *Eckhardt*, 1 M., 312 and 313, and *Bernstein* vs. *Levi and Lewis*, decided in Supreme Court, 1886, not reported.

[7] *Harris* vs. *Blom and another*, 7 J., 41.

[8] *Soeker Brothers* vs. *Humbly*, 3 C. T., 357, *Mostert* vs. *Forde*, 17 S.C., 256.

[9] *Sargent* vs. *Mansfield*, decided in Supreme Court, 1902, not reported.

[10] Novellæ, 134, Chap. 9.

and even a married woman, who carries on trade publicly, and who is married in community of property, may be imprisoned with her husband, or even alone, for her debts: but she can under no circumstances be imprisoned for his debts; nor can he be imprisoned for her debts if they are married out of community of property: and where the decree has been granted against a single woman for her debts, and she subsequently marries in community of property, her husband may be imprisoned for these antenuptial debts of hers without any proceedings being taken against him to shew cause against the imprisonment.[1] By the law of England, also, any married woman (and of course too any single woman) may be imprisoned for her debts.[2]

A decree for civil imprisonment may likewise be granted against an insolvent, if it should appear from the distribution account of his estate framed by his trustee, and confirmed by the Court, that his estate is not sufficient to discharge the debts proved or provable against it. In such a case he must be summoned to shew cause why the decree for civil imprisonment shall not be granted against him for the deficiency of the estate, and on the return day of the summons a motion is made in terms thereof, and the evidence to be adduced in support of the summons is the account of the trustee and the order for its confirmation, with a short affidavit stating the deficiency in the estate and alleging that the estate has been fully administered and that there are no further assets.[3]

But this decree should be applied for by either the trustee or any of the creditors before the insolvent obtains his rehabilitation;[4] and it should further be applied for before the lapse of four years from the date of the debtor's insolvency, unless he has been convicted of fraudulent insolvency, when it may be at any time.[5] In the case of *Kerner* the Court held that the 124th section is not intended

[1] Neostadius, 1, 16 and 57; Loenius, 126; Wassenaar, 1, 23, 1; Decision of the Court of Holland of 28th May, 1599, No. 244; and *Malcolm* vs. *Campbell*, B., 1875, p. 85.

[2] *Dillon* vs. *Cunningham*, Law. Rep., 8 Ex., 28.

[3] § 124 Insol. Ord.; *Nisbet and Dickson* vs. *Richardson*, 1 M., 298; and *re Hoffley*, 526.

[4] § 124 Insol. Ord.

[5] § 17 of Act 38, 1884.

to apply to cases of moral misconduct on the part of an insolvent, but

"is only applicable where there are assets within his possession or means of attainment, as a mode of enforcing payment to creditors;"[1]

and the granting or withholding of this decree is entirely in the discretion of the Court, who will decide according to the circumstances of each case,[2] by either unconditionally refusing the order,[3] or unconditionally granting it,[4] or granting it upon certain conditions, as was done in the following cases:—In *Blake* vs. *Barrow*[5] the Court ordered the defendant, whose income was £91 5*s*. per annum, to pay quarterly £10, and on failure thereof to go to gaol. In the case of *Maynard* vs. *Crole*[6] the defendant was ordered to pay £10 monthly till all his creditors were paid in full, failing which he was to go to prison. In the case of *Sutherland* vs. *Bird*[7] the Court ordered that the defendant should pay quarterly one-third of his salary, which was £140 per annum, to be distributed among his creditors. In the case of *Dickson & Co.* vs. *Rogers*[8] the Court ordered the defendant to pay out of his pension of £485 per annum the sum of £250 per annum, and on failure, to go to gaol. In the case of *Eitzen & Co.* vs. *Van Laun*,[9] out of a salary of £80 per annum the Court ordered the defendant to pay £2 monthly. In the case of *Bate* vs. *Hutton*,[10] out of a precarious income of £200 to £250 a year, the Court ordered the defendant, a dock agent, who had a wife and six children to support, to pay £5 monthly. The same principles apply also to defendants who are not insolvents.

In all cases of periodical payments, whether the defendants are insolvent or not, the amounts may be increased by the Court upon proof shewn that the defendants' pecuniary circumstances have meanwhile improved; and, on the other hand, if the defendants can shew that their incomes have been materially diminished, the Court may reduce the amounts of the periodical payments and extend the period.

[1] 1 S., 105.
[2] § 124.
[3] *Re Morkel*, 1870, not reported.
[4] *Re Brunette*, 1867, not reported.
[5] 3 M., 152.
[6] Decided February, 1857, 3 S., 1.
[7] 3 M., 155.
[8] 3 M., 154.
[9] B. 1874, p. 75.
[10] Decided in 1875, not reported.

In all such cases (*i.e.*, against insolvents under the 124th section of the Insol. Ord.) the money must be paid to the trustee for distribution among the creditors, and the account of the trustees must have been confirmed by the Court,[1] as no decree for civil imprisonment can be granted against an insolvent so long as the accounts in the insolvent estate are not yet confirmed; and though the account has been framed in terms of an order of Court, yet, so long as it is not confirmed, it is not a final sentence, and therefore not a warrant for a decree of civil imprisonment against the insolvent.[2]

No decree for civil imprisonment could formerly be granted against an insolvent for a debt incurred after his sequestration, so long as the sequestration lasted;[3] but now such a decree may be granted against an unrehabilitated insolvent for a debt incurred after his sequestration.[4]

An insolvent is entitled to oppose a decree of civil imprisonment on the ground that he had duly made an objection, though unsuccessfully, to the legality of a proof made on his insolvent estate, and which he could even then prove he was not liable for.[5]

A person who is unwilling to give evidence in a civil case, and who is *suspectus de fugâ*, may be arrested and civilly imprisoned till his evidence can be taken.[6]

As to criminal cases, where the evidence of a witness is in danger of being lost, and he cannot find bail.[7]

No pleadings are filed in a case for civil imprisonment, but on the return day of the summons a motion for judgment is made in terms thereof.[8]

There is no appeal from a decree of civil imprisonment, because civil imprisonment is an execution, and from an execution no appeal may be made.[9] Nor can an appeal be made from the decree whether the judgment upon which it is founded has itself been appealed from or not.[10] But of course there may be such appeals from a Magistrate's Court

[1] § 124 Insol. Ord.

[2] *Nisbet and Dickson* vs. *Richardson*, 1 M., 298; *Villiers* vs. *Le Riche*, 1 M., 518; and *re Hoffley*, 526.

[3] *Norden* vs. *Magadas*, 1 M., 45.

[4] *Reynolds* vs. *Jooste*, B. 1878, p. 1.

[5] *Villiers* vs. *Le Riche*, 1 M., 518.

[6] See Chapter "*Commissions de bene esse.*"

[7] See Ord. No. 40.

[8] Merula 4, 95, 4, 1.

[9] Vroman 4, 4, 1.

[10] *Nisbet and Dickson* vs. *Richardson*, 1 M., 474.

decree of civil imprisonment as to whether or not he exercised a judicial discretion in giving or withholding the decree.[1]

In general, it may be said that everyone can be civilly imprisoned who is not privileged from arrest; and that, as a rule, arrests for civil imprisonment must be made in the same manner as are arrests for *suspectus de fugâ*, and can take place at the same places where, and times when, those arrests are allowed.[2] But in the case of a soldier in the British army, the debt must exceed £30 over and above all costs to entitle the plaintiff to have him civilly imprisoned.[3]

The 10th Rule of the Supreme Court says

"that no service of any process . . . . or any other act done in a civil case shall be valid if done on a Sunday, *except the case of arrest.*"

But this Rule is directory and applies to procedure only, and therefore cannot be said to have altered the common law, which is, that every debtor may be arrested on a Sunday, or any other holy day, *provided there is suspicion of flight and danger in delay*, but not otherwise; and this of course applies to civil imprisonment, as well as to other causes of arrest, in all civil cases, and to all the Courts without exception.[4]

The Sheriff or his Deputy cannot command any bystander to assist him in the arrest of a person in a civil case; he can call to his assistance only those duly appointed and sworn for that purpose.[5] But in a criminal case any officer of the law has the power to call upon any male between the ages of 16 and 60 to assist in carrying out any criminal process.[6]

With us, and so also in England, the judgment-debtor may be taken and lodged at once in the public gaol; but in England in cases of arrest *suspectus de fugâ*, or to find security, the defendant is not to be lodged in prison for 24 hours, in order to enable him to communicate with his friends with a view to a settlement, or to obtain security, but he is in the meantime to be confined in a safe and private place chosen or approved of by the Sheriff. If he will not consent

[1] Act 8 of 1879, and *Field & Co.* vs. *Wernikoff*, 5 C. T., 26.

[2] Peckius, Chap. 10, 2.

[3] *Marriott* vs. *Haigh*, 9 J., 501.

[4] Buchanan's Voet 2, 4, 24; Bort van Arresten, tit. 6, § 7; Peckius, Chap. 10, 1; Gail 1, Obs. 53, n. 13. See Chapter "*Arrests.*"

[5] Placaat 13th November, 1579, G.P.B., Vol. 2, p. 1419.

[6] Ords. 40, § 22; 73, § 11; and 2 of 1837, § 7.

to such a place, or if he and the Sheriff cannot agree thereupon, he may be taken to and lodged in the public gaol at once.[1] With us, though arrested *suspectus de fugâ*, or to find security, the defendant cannot demand detention for any period at a private place on any pretence whatsoever, but must be taken to the public gaol at once, or certainly without any unnecessary delay. If, then, the Sheriff or his officer causes an unnecessary delay in imprisoning the defendant, he will be liable, for the latter's escape, to the plaintiff in the amount of the writ.[2]

In the *Government Gazette* of the 10th May, 1823, appeared certain rules or regulations of the old Court of Justice on proceedings for civil imprisonment, dated the 3rd April, 1823. Some of the rules are a repetition of the law of Holland, while others, where they differ from that law, have fallen into disuse by a contrary practice of the Court. The first part of the 19th section, for instance, coming under the latter class, is as follows:—

"The costs in a case of imprisonment for debt shall always be borne by the plaintiff, whether the imprisonment be adjudicated or rejected," &c.

And in respect of this section the Supreme Court, on the 31st of December, 1832, held that the plaintiff obtaining a decree of civil imprisonment against a debtor is not entitled to the costs thereof from the defendant;[3] but I have found no case where the rule and this judgment have since been brought to the notice of the Court, while on the other hand there are several cases, *since then*, of costs, for obtaining the decree of civil imprisonment against the defendant. For instance, in the case of *Hope* vs. *Brunette*[4] the Court awarded *full costs* against the defendant; and so did they also in the cases of *Sutherland* vs. *Bird*;[5] also in *Bates* vs. *Hutton*;[6] also *Van Santen* vs. *Hopkins*;[7] and in the case of *Eitzen & Co.* vs. *Van Laun*;[8] the costs of the motion were added to the debt.

On a judgment of a Magistrate's Court the plaintiff has

[1] Chitty's Archbold, by Prentice, Vol. 1, Chap. 8, Ed. 6.
[2] See Chapter "*Arrests*."
[3] *Valentyn* vs. *Olivier*, 3 M., 145.
[4] Decided in 1867, not reported.
[5] Decided in 1847, 3 M., 155.
[6] Decided December, 1875, not reported.
[7] 3 J., 81.
[8] B. 1874, p. 75.

to pay the costs to obtain a decree of civil imprisonment, but if it shall appear to the Court that the defendant is purposely withholding payment of his debt, with a view to annoy the plaintiff, the defendant may in that case be ordered to pay costs.[1]

If the debtor, at any time after he is imprisoned, should offer to pay the debt, he is bound also to pay all the costs incurred by the plaintiff up to that date (except as to what is mentioned in the preceding paragraph), and to refund to the plaintiff the money paid for his maintenance in prison.[2]

By the 4th paragraph of the 3rd of the Twelve Tables, above quoted, it is provided

"that the debtor . . . . shall live . . . . *at his own expense* . . . ., but if too poor the creditor . . . . must supply him with a pound of bread daily."

The principle that the debtor must maintain himself while in gaol, or, in case of poverty, must be maintained by his creditor, has been adopted by the law of Holland.

But even if the debtor maintains himself, though he may have the choice of what food and drink he pays for, or what his friends may send him, these are nevertheless subject to the inspection of the gaoler, whose duty it is to see that the food is wholesome and the drink reasonable; otherwise, injurious or poisoned food may deliberately be introduced, even at the request of the debtor, by his friends; and as to drink, the effects may cause a disturbance. The debtor is therefore, while in gaol, subject to all the prison regulations as to health, safety, and good order, &c.[3]

The maintenance in gaol, if at the expense of the creditor, is to be neither too scanty on the one hand, so as to cause injury to the debtor's health, nor, on the other hand, too luxurious, so as to cause unnecessary expense to the creditor, but shall be for the debtor's necessary support: and differences formerly naturally arose, especially in regard to debtors who were accustomed to "all the good things of this earth," without a thought of their creditors, as to what the one

[1] § 22 of Act 20 of 1856.
[2] Sande 1, 17, 2.
[3] See the various Placaaten to the "Cipiers and Deurwaarders" in Cau's collection of the Placaaten.

should get and the other should allow. In consequence, therefore, the allowance for maintenance was fixed the same in every case, without any reference whatever to the debtor's habits or customs, health or social position; and with the money so to be paid by the creditor the gaoler has to buy the necessary suitable and wholesome food for the debtor.

. . . By the Ordinance and Instructions of the Court of Holland of the 21st December, 1579,[1] the amount to be paid by the creditor for the maintenance of the debtor in gaol was 3 stivers (1½*d.*) a day. This was re-enacted by the Hooge Raade on the 31st May, 1552.[2] But by the Ord. and Instr. of the Court of Holland to the Gaolers (Cipiers) of the 19th November, 1610, and 26th March, 1632,[3] the amount was increased to 16 stivers (8*d.*) a day, or *so much more or less as by the Court or State shall be taxed or ordered, according to the circumstances of the times.*

This section was almost *verbatim* re-enacted by the 10th section of the Instructions of the Courts of Holland of the 25th July, 1754,[4] and the allowance was thereby increased from 16 to 18 stivers (9*d.*) a day, and as it was the last enactment made in Holland on this subject, and has also the force of law in this Colony, except now as to the amount, I shall here give an extract of it:—

> ". . . . and concerning persons who are in gaol at their own expense, or at the expense of their creditors . . . . (the gaoler) . . . . shall be obliged to see that they are provided with wholesome food and drink, at 18 stivers a day, *or so much more or less, as by the Court or the State shall be taxed and ordered, according to the circumstances of the times.*"

In both the ordinances just mentioned it will be noticed that the amount for maintenance, though fixed, was liable to be increased or diminished, at the discretion of the State, or the Court, "*according to the circumstances of the times*"; that is, in other words, according to the price of provisions from time to time: and that by neither enactment were the habits, customs, social position, or health of the debtor taken into consideration in regulating the allowance for maintenance, but only the "*circumstances of the times.*"

[1] G.P.B., Vol. 2, p. 770, § 15.
[2] Ibid, p. 834, § 275.
[3] Ibid, p. 1509, § 9.
[4] G.P.B., Vol. 8, p. 769.

Until the passing of these two ordinances (of 1632 and 1754) the law was that the allowance to debtors had to be paid daily, but whether in advance or at the end of each day is not certain. But by the 20th section of the former ordinance[1] it was enacted (and I here give an extract of that section, as it is law also with us) that . . .

"Every creditor who causes a debtor . . . . . to be imprisoned . . . . shall . . . . be bound every eight (8) days to pay to the gaoler, or to give good and approved security for, whatever the debtor, to the extent of 16 stivers (but afterwards increased to 18 stivers), or less, according to the order of the Court, shall have consumed; and in default thereof the Court authorises its 1st (chief) messenger, when requested thereto by the gaoler, to levy an execution on those who caused the debtor to be imprisoned, or their sureties, at the choice or option of the gaoler. And in default of the goods of the creditor, or his sureties, the gaoler shall not be obliged to retain the defendant longer, provided he first gives them (the creditor and sureties) eight days' previous notice that they may, within that time, pay, or give sufficient security for, the expenses already consumed and that may be consumed."

This section was afterwards re-enacted, with the alteration only of 16 to 18 stivers a day, by the said Ord. of 1754, § 23.[2]

Although these sections as to the allowance payable are in the past tense "shall have consumed," it is to be noticed that the arrangement with the gaoler as to the payment had to be made *every eight days in advance*, though satisfactory security might also be given for the payment to be made at the end of every eight days, and the gaoler can thus protect himself by taking ample security not only for the costs already consumed, but also "that may be consumed."[3] But in the Magistrate's Court the payment must always be made eight days in advance.

But even if the creditor is in default with his payment after the notice given, the gaoler cannot, in consequence, discharge the debtor from gaol without an order of the Court. The 17th section of the Ordinance of 1632[4] enacts that "the gaoler shall receive no person as prisoner but by express order of the State or of the Court"; and the 18th section enacts that "the gaoler shall release no (prisoner) but by

[1] G.P.B., Vol. 2, p. 1511.
[2] G.P.B., Vol. 8, p. 770.
[3] Consult also Vroman, 4, 4, 5, and Van Alphen, Vol. 1, Chap. 31; Merula, 4, 99, 1.
[4] G.P.B., Vol. 2, p. 15, § 10.

express order as above." These two sections have been re-enacted by the Ord. of 1754, sections 20 and 21.[1]

Our Supreme Court has also decided that when a Magistrate, for sufficient cause, discharges a prisoner from gaol who has been imprisoned there for civil debt, the gaoler is bound to obey such order and release the prisoner.[2]

If, then, the creditor or his sureties fail to pay even during or after the eight days' notice, and pending the order of Court for the debtor's discharge from prison, who pays for the latter's maintenance in the meantime? The answer is, either the debtor himself, or, if he is too poor, then the gaoler. The principle of the law is that the debtor should maintain himself, and if he is too poor, then the creditor should do so. But if the creditor is in default with his payment it is the gaoler's responsibility. The obligation of maintenance never falls on the State, which guarantees only the safe imprisonment. By all the Placaaten on the subject the duty is cast upon the gaoler to make arrangements with the creditor for the necessary maintenance of the debtor, and the gaoler may from time to time demand security to his satisfaction. If, then, he takes insufficient security, it is his own fault. As to the period for which the security must be taken, it should be a reasonable time to enable the gaoler or the debtor to move the Court for the latter's discharge from prison, after the lapse of 8 days' notice to the creditor. Of course, the gaoler is entitled to sue for and to recover from the debtor, as well as from the creditor and his sureties, the expenses of maintenance.[3] But the gaoler could not detain the debtor in prison, or any of his goods, in satisfaction of or as security for any ordinary expenses of maintenance (and consequently not for any extraordinary expenses either), or costs of consumption which the debtor may have incurred or consumed while in gaol, without an express order of the Court to that effect.[4] The expenses to be recovered by the gaoler from the creditor or his sureties are only the *ordinary* expenses of consumption: that is, for the usual and necessary food for the debtor's

[1] G.P.B., Vol. 8, p. 770.
[2] *Barnes* vs. *White*, 3 J., 181.
[3] See the several Placaaten to the "Cipiers and Deurwaarders."
[4] G.P.B., Vol. 8, p. 770, § 24.

maintenance. Anything more than that, or any *extraordinary* expenses, for supplies by the gaoler, either of his own accord or at the request of the debtor, he must recover from the latter. This point was decided by the Supreme Court of Holland on the 19th November, 1568, in appeal from the Provincial Court of Mechlin in the case of *Marten Fransz Cipier* vs. *Hendrik Cornelisz*, alias *Reyn Onreyn*.[1]

In all cases of *ad factum praestandum* judgments the plaintiff must also previously and in advance arrange (*te voren moeten afspreken*) with the gaoler the expenses of maintenance which the defendant *might consume* during his imprisonment, and if this is not done the latter cannot be imprisoned.[2]

Excepting in the Proclamation of the 5th February, 1813 (already referred to), and which applies only to "small debts," we have no local enactment on the maintenance of a debtor imprisoned by a judgment of any of the Higher Courts, and by that Proclamation the gaoler

"cannot demand . . . . any fees or other expenses than that of the defendant's diet, at the rate of 10 stivers (5*d.*) a day for each day."

But this refers only to those who are imprisoned for a debt not exceeding £1 10*s.*, and where the imprisonment is not longer than one month. Nothing is said in the Proclamation about the maintenance fees for those who are imprisoned for the larger sum therein mentioned (£3 15*s.*), and for which the imprisonment is for not more than six months.

Practically, that Proclamation is now never brought into operation, though still law, because all "small debt causes" are heard in the Magistrates' Courts; but a case may arise in the Higher Courts where judgment for a debt may be given for not more than the amount mentioned in the Proclamation. Both these sums apply to the original debt and are exclusive of costs.

But by the Magistrate's Court Act[3] the charge for maintenance *is one shilling per day, payable weekly, in advance*, by the creditor to the gaoler, who hands it to the imprisoned debtor; and if the creditor fails to do this the debtor is

[1] Neostadius, Cur. Sup., Dec. 1.
[2] Reglement of 26th March, 1680, §§ 36–39; G.P.B., Vol. 3, p. 659.
[3] 20 of 1856.

forthwith to be discharged from custody by the gaoler, without any other proceeding being necessary.[1] This section contains a provision to the effect that

"the plaintiff . . . . shall pay and satisfy the charge for the maintenance of the defendant *precisely as if such defendant had been committed . . . . by virtue of a decree of civil imprisonment, made or granted by the Supreme, or any Circuit, Court.*"

I fail to see the object of this proviso, in the face of the fact that in the same section it is enacted that the maintenance fee which is fixed shall be paid weekly, in advance; but if it has any other object, then to find out what this is we must look to the law of Holland. Indeed, it may be generally said that when this Act or the said Proclamation has made no provision as to the detention of a civil debtor, we must revert to the law of Holland.

The sum of 1*s.* per day for maintenance having been fixed by the Legislature for all civil debtors imprisoned by a judgment of a Magistrate's Court, it may fairly be presumed that this is the best criterion for the higher Courts also to go by in deciding what is a reasonable maintenance fee under any of their own judgments, unless the exigency of the times requires a larger amount; and probably this is the reason why we have not yet had any such application made to the higher Courts; the general impression being that the allowance of 1*s.* per day applies to all judgments of all Courts without exception. But suppose that the price of provisions should enormously increase to-morrow, and it could be proved beyond all doubt that sufficient food of any kind could not be purchased for 1*s.*, for a day's necessary maintenance of any person, we should have this result, that a defendant imprisoned by virtue of a Magistrate's judgment could claim no more from the plaintiff than 1*s.* per day, because the Legislature had fixed that amount without any discretionary power to any Court of increasing it. For the same reason the plaintiff cannot pay less than 1*s.*, though he could abundantly prove that owing to the cheapness of provisions not a quarter of that sum was required for the defendant's necessary maintenance; and here also the Court has no discretionary power

[1] § 18.

given it of reducing that sum. While the same person, if he were imprisoned by the judgment of any higher Court (unless he comes under the first section of the Proclamation), could call upon the plaintiff to pay for the increased price of provisions, and so also the plaintiff could apply to the Court to have the amount reduced for the diminished price of provisions; and in each case, "according to the circumstances of the times," and as in the "discretion of the Court may seem reasonable."

Is then the defendant, under a Magistrate's judgment, to starve or to be discharged from gaol because he cannot obtain a day's necessary food for 1*s.*, and has not the means to support himself? Certainly not. The defendant can neither demand, nor can the plaintiff be compelled to pay, the increased difference. Of course, it follows that if the plaintiff wishes to detain the defendant in gaol, he must bear the extra expense, and it is therefore at his option to pay it or not. But very strong evidence will be required to be produced by the debtor that he cannot be maintained for a shilling a day owing to the high price of provisions, and that he has no means of his own to pay for the extra amount required. If then the creditor declines to pay it, the defendant is entitled to his release, but not without an order of Court, as the plaintiff's failure or refusal under such circumstances does not come under the 18th section of the Magistrates' Court Act, while the defendant's detention on the payment of the extra expense by plaintiff will come under the first proviso of that section.

There is of course nothing to prevent, under the judgment of any Court, payment for maintenance being made for a longer period in advance than eight days, but the gaoler cannot be compelled to accept it. It may be inconvenient for him to do so, or he may not wish to run the risk of a possible loss. On the other hand he may prefer to accept a larger sum in advance, especially under judgments of the higher Courts, so as to run no risk of having to sue the plaintiff or the defendant for the latter's maintenance.

When the defendant has been once released from gaol on the ground that the necessary maintenance has not been paid,

it is not stated by any writer whether he can be imprisoned again on the plaintiff paying the arrear maintenance allowance, and also offering payment in advance for the future. The general principles seem, however, to be against a re-imprisonment caused through the neglect of the plaintiff. It is clear that by virtue of a Magistrate's Court judgment it cannot be done,[1] nor by the Proclamation; nor can it be done by the English law.[2] But of course on all general principles, and also on that of this case just mentioned, a person ordered to pay in instalments, but making default in the payment of any of these instalments, can be imprisoned for each instalment as it from time to time becomes due.

A discharge from imprisonment is, however, under no judgment a discharge of the debt, for which the defendant always remains liable till released by the plaintiff or by operation of law.[3]

I had once a client who had made a will in which he put aside £3,000 for the purpose of maintaining in gaol a debtor whom he had imprisoned under the 124th section of the Insolvent Ordinance. His own subsequent long and serious illness, but chiefly the effect of a sermon preached by the late Bishop Gray on the "Unforgiving Spirit," led him to alter this will and also to release the prisoner. The outside public will probably regard such a will as an act of revenge, and be shocked at the idea of it, but they little know of the iniquity of some debtors and the consequent hardships suffered by some honest creditors. In most cases, however, it is the want of funds, frequently caused by the debtor's conduct, that prevents a creditor from detaining his debtor in gaol for a long time; or sometimes it is out of pity for the sufferings and at the sight of the tears and cries of distress of the debtor's innocent wife and little children; or the creditor sometimes regards the money for maintenance as uselessly spent, or his own feelings revolt at the idea.

But though under a judgment of any of the higher Courts a defendant is liable to be detained in prison till the debt and

[1] § 18.

[2] *Evans* vs. *Wills*, L. Rep. 1, C.P.D., 229.

[3] Sande 1, 17, 2, and Act 20, 1856, § 20.

costs are paid, the tendency of Courts of law at the present day is against long imprisonments and severe punishments. It may be that our modern ideas and feelings take a different view of what amounts to a long imprisonment or a severe punishment, and therefore a debtor need not be afraid that in cases where a Judge has the discretion to release him, his incarceration will last as long as his creditor may please to detain him. But the Court on being appealed to may, in the exercise of its discretion, and in the absence of a time fixed by law, consider whether the imprisonment already suffered is adequate under the circumstances, and may accept, if tendered, the surrender of the debtor's estate, and then discharge him from prison; or, if he is already insolvent, may grant him his rehabilitation, where practicable, which will then discharge him; or, where neither of these two things can take place, may suspend the operation of the writ for an indefinite period, conditionally or unconditionally.

It has already been stated that the plaintiff is bound only to provide for the defendant's necessary food and nothing more. The bedding, the usual prison bedding, with its belongings according to the season of the year, are supplied by the State free of charge; but if the defendant wants a better bed or extra coverings beyond the prison allowance, he must pay or provide for it himself, but not the plaintiff or the gaoler. Any bedding the defendant may introduce is, like his food, subject to the inspection and approval of the gaol authorities. All debtors must sleep apart and be kept separate from any other class of prisoners in the gaol; and, if necessary, two debtors must occupy the one bed, unless they pay for separate beds. They must not take their meals with criminals, and the males must be kept separate from the females; they may, however, have a guest to their mid-day meal (but at none others), and at their own expense. The debtor must also provide himself with his own clothing in prison, and if he has none he must wear the usual prison clothes. So also he must pay for his own washing; but if he cannot, the clothes must be washed for him by the prison authorities free of charge.[1]

[1] G.P.B., Vol. 2, p. 1511, §§ 19-30; Ibid, Vol. 8, p. 770, §§ 11 and 34.

The debtor's illness, however serious, is no ground for his discharge from gaol, and the plaintiff is not liable for the debtor's medicine or any medical expenses; the debtor must pay for these himself. The debtor is, however, entitled to be attended by his own medical adviser on paying him for it. But if, for whatever cause, medical attendance or medicines should become necessary, and the debtor will not, or cannot pay, for them, then he must submit to the treatment of the doctor of the prison; and the expense of such attendance and such medicines can be recovered from the debtor, when he is afterwards able to pay for them; failing which they must be borne by the gaol as in criminal cases.

It is surprising that the State should so far back as 1510 have taken upon itself the safe custody of all debtors, and in addition thereto provide them with certain things, without any charge to either debtor or creditor, and without any corresponding advantage to the public as in the case of the labour of convicted criminals, and that this obligation still continues. If the Government in certain cases is to be responsible for the safe custody of a debtor, who is after all confined only at the instance of a single individual and in whose incarceration the public have not the same interest as they have in the locking up of criminals, it is worth considering, on grounds of general policy, whether the State should any longer bear the responsibility without some recompense in return.

Though the debtor is bound by all the prison regulations as to general good order, air, health, exercise, and obedience, &c., he cannot be made to work while in gaol, or undergo any labour, or suffer punishment of any kind, except for a transgression of a prison regulation; for the rule is that "no harm shall be done to his skin;" and the rule that "he who has no money shall pay it with his skin" is applicable only to criminal cases and does not apply to civil debtors. Moreover the object of imprisoning a debtor is to preserve and detain him in a place of safety, and to restrain him of his liberty for a time, but not otherwise to punish him. Nor can a debtor be confined in an unhealthy or a foul-smelling place, or where

he has no fresh air, or where he sees no light, or inhales bad air, or where the place is full of insects.[1]

If the debtor escapes from gaol through the default, delay, or negligence of the gaoler, or by the privity or connivance of his servants or others under his charge and control, he (the gaoler) is liable to the plaintiff in the capital, interest and costs due by the defendant to the plaintiff, and also for any damages which the creditor may thereby sustain; but he is not liable if the escape be forcible and during the night, or by an accident, provided he and the servants of the gaol have done all in their power to prevent it.[2] If the escape is through the insufficiency or defective state of the prison, the Government will also be liable; and in any case it would be better to make the Government a co-defendant with the gaoler in an action for an escape.

In criminal cases if the gaoler purposely, or by the neglect of himself or his servants, allows the escape, he is to be punished in a like sentence as that for which the criminal was confined, even to suffering capital punishment.[3] The Cape Supreme Court in 1895 decided that this punishment has in modern days become discretionary.[4] But the Sheriff, or his Deputy, is not responsible for the rescue, or escape, of any person out of his custody on his way to any gaol, or after being lodged therein, if such rescue or escape happens without his default or connivance.[5]

The right of visiting the debtor in prison was originally confined only to the prison authorities, but in later times the legal adviser of the prisoner can at all reasonable times see him, and relatives and friends of the prisoner are now also allowed to see him at stated times and in conformity with the prison regulations.[6]

"Civil Imprisonment" has much in common with "Arrests," and it may therefore be generally stated that whenever the

[1] G.P.B., Vol. 8, p. 769, §§ 11–36; Loenius 94; Van Zurck, Cod. Bat., Tit. "Gevangenis"; van Leeuwen, 5, 27, 13; Carpsovius, Lyfstraffelyke Misdaden, Vol. 2, Chap. 103, n. 2; and Ord. 24 of 1847.

[2] G.P.B., Vol. 8, p. 770, § 27; Merula, 4, 24, 9; Lord Erskine's Institutes of the Laws of Scotland, Vol. 2, p. 739, § 14.

[3] G.P.B., Vol. 8, p. 769, §§ 15 and 16.

[4] *Queen* vs. *Loftus*, 12 S. C., 434.

[5] Ord. 37 of 1828, § 4.

[6] See also Ord. 40, § 38.

two do not stand in conflict with each other, or have not separate rules for procedure, the law given in the one is for the most part applicable also to the other subject in a like case; and the differences between them will be found at the end of the Chapter on "*Arrests.*" So also there is in many respects a great similarity between the proceedings in *Praestatio facti* and contempt of court, as will be seen in the Chapter on "*Contempt of Court.*"

As the young student may not at once appreciate the differences between the effect of a judgment for civil imprisonment in the Magistrate's Court and in the higher Courts, it will be convenient to state them here in parallel columns:—

In R. M. Courts.	In the higher Courts.
1. The amount for which the debtor can be imprisoned is limited.	1. Unlimited, except as to the judgments coming under the Proclamation.
2. Period of imprisonment is limited.	2. Unlimited, except as to the period mentioned in the Proclamation.
3. The maintenance fee is 1*s.* a day.	3. Except in the case of the Proclamation (where it is 10 stivers) the maintenance fee is "according to the circumstances of the times and in the discretion of the Court."
4. This fee to be paid every eight days in advance.	4. According to arrangement with the gaoler, or at the end of every eight days on approved security being given to him.
5. On failure of payment in advance, the gaoler can immediately discharge the prisoner.	5. Cannot be discharged without notice to the creditor, and then also only on receiving an order of Court to discharge.

Summons for civil imprisonment on an unsatisfied judgment.

(Heading.)

Command . . . . of . . . . in the district of . . . . that justly and without delay he render and pay to . . . . of . . . . in the district of . . . . the sum of £ . . . . sterling of lawful money with interest thereon from the . . . . day of . . . ., which he owes to the said . . . . upon and by virtue of a certain sentence of the Supreme Court of this Colony bearing date the . . . . day of . . . . together with the sum of £ . . . . sterling, being the taxed costs incurred by the said . . . . in obtaining the said sentence, which said

sentence has been carried into execution and a return since made thereon that no goods or chattels of the said .... could be found whereof the exigency of the said writ or any part thereof could be made; as it is said:—And unless he shall do so then summon the said .... that he appear before our Justices of our Supreme Court of our said Colony at Cape Town on the .... day of .... at ten o'clock in the forenoon, or so soon thereafter as counsel can be heard, to shew wherefore he hath not done it; and also to shew cause, if any, why a writ of personal attachment shall not forthwith be decreed to issue against the person of the said .... to have effect and hold good until he shall have paid the said sums of .... and .... and ....:—And also summon the said .... then and there to plead to the claim of the said .... for payment thereof under security with costs and to join issue thereon; and serve on the said .... a copy of this summons, of the said sentence, writ of execution and return thereon, whereon the said claim is founded; and return you then there this summons with whatsoever you have done thereupon.

Witness, &c.

Summons for civil imprisonment under § 124 of Insolvent Ordinance for deficiency in the estate.

(Heading.)

Command A.B. .... of .... in the district of .... that he appear before our Justices of our Supreme Court of the Colony of the Cape of Good Hope at Cape Town on the .... day of .... at ten o'clock in the forenoon, then and there to answer C.D. .... of .... in his capacity as trustee of the insolvent estate of the said A.B., and to shew cause, if any, upon motion then and there to be made by the said trustee, why the process of this Honourable Court for the civil imprisonment of the said A.B. shall not be granted, until he shall have rendered and paid to the said trustee for the benefit of the creditors of the insolvent estate of the said A.B. the sum of £ .... sterling, which the said A.B. owes to his said insolvent estate, being the balance deficiency due by him to the creditors of the said estate, who have proved claims amounting to £ .... sterling, which said insolvent estate has been fully administered and duly liquidated and the accounts of liquidation and plans for distribution of said estate by the said trustee have been duly confirmed by this Honourable Court on the .... day of .... and from which it will be seen that the said estate is not sufficient to discharge the debts proved against it, and that the said sum of £ .... is the deficiency and the balance still due and owing to the creditors of the said estate in respect of their proofs of debt.

As it is said, &c.

Witness, &c.

(NOTE.—*Copies of the liquidation account should be served with the summons.*)

Affidavit in support of the summons.

(Heading.)

I, C.D. of . . . . make oath and say :—

1. That I am the duly appointed trustee of the insolvent estate of the said A.B., and that as such trustee I have fully administered the said estate, and filed with the Master of this Honourable Court the accounts of my administration and plans of distribution of the said estate, and that these accounts numbering together . . . . were duly confirmed by this Honourable Court on the . . . . day of . . . .

2. That the debts proved against the estate amount to £ . . . . : the assets of the said estate amount to £ . . . ., and after deducting the necessary expenses in connection with the administration of the said estate, the balance assets for distribution among the creditors amount to the sum of £ . . . .

3. That of this balance the sum of £ . . . . was rendered to two of the preferent creditors; the remaining preferent creditors and all the concurrent creditors getting nothing whatever; that there is thus a deficiency in the estate of the sum of £ . . . ., and that there are no further assets in the estate to meet any part of this deficiency.

(Here the deponent can add any reasons, or give any facts which he thinks will tend to strengthen and induce the Court to grant his application, for instance.)

4. That the insolvency of the said A.B. was not due to any misfortune, or any unforeseen event, but was caused by his reckless speculations at a time when he knew he had no means or prospect of meeting any of his obligations.

5. That since the confirmation by this Honourable Court of the plan of distribution of the said estate, the said A.B. has inherited out of the estate of his father E.F. . . . . the sum of £ . . . . : and that he is at present under a three years' engagement as manager of the . . . . Company at a salary of £ . . . . per annum, which salary is far more than is necessary for his absolute requirements; and that he ought to pay into his estate the amount of the inheritance received as aforesaid, and to make also periodical payments to his estate of a reasonable proportion of his salary.

Sworn at . . . .

this . . . ., &c.

Summons for provisional sentence in the Supreme Court on an unsatisfied judgment of a Magistrate's Court and for civil imprisonment.

(Heading.)

Command A. of . . . . that justly and without delay he render and pay to C. of . . . . :—

1. The sum of £ . . . . which he owes to plaintiff upon and by virtue of a certain judgment of the Resident Magistrate's Court of . . . . bearing date the . . . . day of . . . . obtained against him by the said plaintiff, being the amount of (*here state the cause of debt*) for which said judgment

a writ of execution was issued out of the office of the said Magistrate directed against the movables of the said defendant, but a return of *nulla bona* was made thereon by the messenger of the Court.

2. The sum of £ . . . . being the taxed costs and charges of the said plaintiff in and about obtaining the said judgment and of the execution of the said writ.

3. And unless he shall do so then summon the said A. that he appear before our Justices of our Supreme Court of our said Colony at C . . . . T . . . . on the . . . . day of . . . . at 10 o'clock in the forenoon to shew wherefore he hath not done it, and to shew cause further why by reason of the said defendant having left the jurisdiction of the said Magistrate and now residing in another district where a writ for civil imprisonment of the said Magistrate cannot be enforced, this Honourable Court shall not grant a writ of personal attachment against the said A. to have effect and hold good until he shall have paid the said sums of . . . . and . . . . And also summon the said A, there and then to plead, &c. (*Conclude as in first form of summons above.*)

Writ for civil imprisonment.

(Heading.)

We command you that you take A.B. of . . . . in the district of . . . and safely keep him in the prison of the said division until he shall have paid to C.D. of . . . . the several sums of £ . . . . sterling with interest thereon from the . . . . day of . . . . : and the sum of £ . . . . sterling, being the taxed costs and charges which the said C.D. by sentence of our Supreme Court of our said Colony bearing date the . . . . day of . . . . recovered against the said A.B., and whereof the said A.B. is convicted as appears to us of record. And have you this writ before the Justices of our said Supreme Court at Cape Town on the . . . . day of . . . . with whatever you have done thereupon.

Witness, &c.

(NOTE.—*The return day in this writ is not absolutely necessary and may be fixed at any distance of time, especially when it is anticipated that a considerable period may elapse before the defendant can be taken. But a return date is put as the writ must be returned to the Registrar of the Supreme Court with the Sheriff's return thereon to be kept of record. A copy of the writ should be given to the gaoler as his warrant for detaining the defendant.*)

CHAPTER X.

SUBPŒNAS.

THE term "Subpœna" is derived from the English law, from the words therein which command the party called to appear at the day and place *sub pœnâ centum librarum*, under a penalty of a hundred pounds. By our law it is called a "summons," and so is it called in the 33rd Rule of Court, though in the marginal note to the forms subjoined to this Rule the word "subpœna" is used. The only way to account for this expression and for this form, containing the penal clause of £100, is that in those days (1828) it was the form used in the Courts of Westminster, and the person who framed the Rule, as authorised then by the Charter of Justice, copied the English form because there were no English forms then in existence, the proceedings of the Court up to then being conducted in Dutch. The term "subpœna" has, however, become general and familiar with us in practice, and is used in the profession in preference to the word "summons," when the attendance of a witness is meant; while laymen generally still use the term "summons." Subpœnas are divided into (1) *ad testificandum*, and (2) *duces tecum*. The former is the usual or common subpœna to compel a witness to attend a trial and to give evidence. The latter is where a witness is called upon to bring with him, and produce at the trial, any deed, document, books, accounts, correspondence, &c., in his possession or control. The two kinds may, however, be included in one subpœna, as is now always done in practice, to save the expense of separate, or special, subpœnas. But the particular documents or books required

to be produced must be specified with reasonable distinctness, so as to leave no room for doubt.

The penal clause of £100 mentioned in the forms was not in use in Holland, nor in this Colony, before this form was framed, the power till then to fine being unlimited; and though it may be said that the Court cannot now, because of this clause, fine a witness more than £100 for not obeying the subpœna, the other powers of the Court—such as imprisonment for contempt in addition to the fine—are untouched and unlimited; and so also is the power of the Court unlimited as to the fine when a witness, once in the box, refuses without lawful cause to answer a question when told to do so.

But in addition to the power of the Court to fine and imprison a witness for his contempt of the process of the Court, he is liable also, at the suit of the party subpœnaing him, for any loss or damage sustained by reason of his non-attendance at the trial.[1]

In order, however, to bring a witness under the penalties and liabilities here mentioned, there must be proof before the Court, usually by an affidavit, that he has been duly subpœnaed a reasonable time before the trial, and that his reasonable expenses have been paid or tendered to him. The "reasonable time" is a matter for the Court to decide.[2] If the witness wishes to be freed from the consequences of his contempt, he must shew good grounds to satisfy the Court that he was not able to attend. So long as he does not do this the Court must presume and act as if he had no lawful impediment.

As to what the "lawful impediments" are must depend upon a variety of circumstances, such as serious and dangerous illness, infirmity of age or health, such as to make it dangerous or painful to travel; or unforeseen and unavoidable accidents; utter impossibility from acts of God; or, in short, any reasonable cause that might render his attendance in open Court prejudicial to health or life. The essential requisite is

[1] Merula 4, 65, 1 to 15; and Rule of Court 33.

[2] Consult also *Barber* vs. *Wood*, 2 M. and R., 72; *Marisell* vs. *Ainsworth*, 8 Daniell's Practice in Chancery, 869.

that the Court must be satisfied that the witness has done everything in his power that could be expected from a reasonable being to attend the trial, but is prevented by causes over which he had no control, or which could not be avoided.

But besides the reasons and the lawful impediments here mentioned, and such other lawful grounds, or causes, or excuses as the Court may be satisfied with, a witness, though he is not entitled to any *induciæ*—that is specified intervening time between date of service of subpœna and date for his appearance in Court—is yet entitled to be served with a subpœna a reasonable time before the day of his appearance. What this reasonable time is rests entirely in the discretion of the Court, and must depend upon the circumstances of each particular case, the rank and station and calling of each witness, the distance to be travelled, the mode of travelling (whether by railway, steamer, sailing vessel, vehicle, on horseback, or on foot), the state of the roads, the seasons, the weather, the swollen rivers, drought or want of food or water for man or beast, and a due regard also to the state of the health of the witness; and whether he or she can travel alone, or must necessarily go in company with someone, either on the ground of illness, extreme youth, or old age, when to travel alone would be unsafe, or clearly unadvisable, or undesirable, or not to be tolerated. The object of a reasonable time is to give a witness an opportunity to put his affairs in order, or to make the necessary arrangements so as to leave home with as little prejudice to himself as possible in his attendance at the trial in obedience to the subpœna. Then, in addition to the reasonable time, a witness is also entitled to be prepaid his reasonable expenses. The travelling expenses and personal allowance to the witness for the various Courts in the Colony are regulated by the 315th Rule of Court. These remunerations are according to a person's business, trade, profession, or calling, the distance from the Court-house, and the necessary mode of travelling.[1] Any ground on which a witness wishes to be excused, or to be

[1] For the English law on this point, see *Dixon* vs. *Lee*, 3 Daniell's Practice in Chancery, 259.

exempted, from attending a trial should be sworn to either by himself or by someone else having personal knowledge of the fact; or such other additional evidence should be adduced as to satisfy the Court of the truth and of the reasonableness of the objection, and thus avoid a fine and imprisonment. If, however, for whatever good cause, a witness should not be able to represent his lawful impediments to the Court before he is fined or imprisoned, he should petition the Court immediately, or within a reasonable time thereafter, for a remission of the sentence, and set forth fully in his petition, and otherwise prove the reasons, why he did not, or could not, attend the trial in time.

As to whether or not the term "reasonable expenses" means sufficient only to take a witness to the Court, or includes his travelling expenses and allowance for personal attendance "for going *to*, detention *at*, and returning *from*, the Court," has not been definitely decided in this Colony. The term "conduct money," derived from the English law, means only the witness's necessary travelling expenses, to be paid him on the service of the subpœna, and popularly it has been taken to mean only the travelling expenses to the Court. But this is not so.

In the case of *Girds* vs. *Hitzeroth*,[1] the defendant was subpœnaed at the instance of the plaintiff to produce his books at the trial. He was paid £15 on being served with the subpœna at his residence at Uitenhage. At that time there was no railway, and he could not for that sum travel overland to Cape Town. But he could come for less than that by the weekly steamer from Port Elizabeth, which is the nearest port to, and only about 15 miles from, Uitenhage. On his name being called as a witness, and there being no response, the affidavit of service of the subpœna was read, which affidavit contained also a statement that the sum of £15 was at the same time paid to the witness for conduct-money. The Court, on enquiry, was answered from the Bar that this sum was sufficient to bring a witness to Cape Town, and thereupon at once fined him £25 for his contempt, and ordered a writ to be handed to the Sheriff forthwith.

[1] Decided in 1869, not reported.

Since then there has been a general impression among practitioners that it is sufficient to pay a witness conduct-money to enable him to come to the Court, leaving him to get back as best he can. But it must be pointed out here that Hitzeroth did not appear in answer to his subpœna to urge his "lawful impediments," nor did he at any time afterwards make them known to the Court.

But the point was raised in the case of the *Trustees Estate Goldschmidt* vs. *Goldschmidt and others* in 1881,[1] and though the latter part of the headnote of that case says "that he (the witness) was not bound to attend as a witness, unless the expenses of himself and attendant *to* and *from* the place of trial were paid to him," the judgment itself does not clearly bear this out. There was proof that, owing to illness, the witness could not safely travel without an attendant; he resided at Grahamstown, whence he could travel by train to Cape Town, and of course the attendant must go in the same compartment with him; he was tendered £35, but on making his objections that this amount was insufficient, the Court ordered an additional £15 to be paid. £50 certainly was sufficient for the travelling expenses of the witness and his attendant to and from Cape Town, and though the Court may actually have decided, I do not understand the judgment, as reported, definitely to bear out the headnote.

But even if the headnote correctly represents what transpired in Court, it refers only to "expenses to and from the Court," and does not settle the question as to hotel expenses, nor as to whether the term "reasonable expenses" mentioned in the 33rd Rule of Court includes the expenses of attendance or detention *at* Court while the case lasts, nor as to the allowance for "personal attendance" mentioned in the 315th Rule of Court.

But, whatever doubt there may be among some practitioners, there is none whatever in law. The doubt, as so frequently happens, is an unnecessary creation of our own, owing not to what the Rule of Court does say, but to what it omits to say. The Rule itself, stripped of the two forms, is, after all, only an echo, though in fewer words, of the law of

[1] 1 J., 87.

pœnaed, if the Taxing Officer is satisfied that a witness had been requested to come to the Court and he came *bonâ fide* for the purpose of giving his evidence, he should allow him his expenses as against the opposite party.[1] And if a person is a witness in more than one case on the same day, he can claim no more than one fee for personal attendance and one allowance for travelling expenses.[2]

It may sometimes be hard on a suitor that he has to prepay his witnesses, but it is harder on a witness to leave his own work or business alone, perhaps a poor day-labourer who may thereby forfeit his wages, or even a situation, in order to render his services entirely gratis for the suitor's benefit, or to be insufficiently paid if the suitor or his opponent, who may be condemned to pay costs, fails to pay the amount to which he would be fairly entitled. I have known of several hard cases where a witness, especially among the poorer classes, after having given his evidence was left to get back the best way he could for want of funds, and his luggage detained at the boarding-house or hotel as a lien for board and lodging expenses, because he had been paid, when served with the subpœna, barely sufficient, or just enough, to take him *to* the Court only.

The English law on the subject of the prepayment of a witness's expenses, to and from and at Court, is the same as ours; but while according to the English decisions the money must be paid or tendered to the witness *at the time of serving of the subpœna*, with us it is sufficient if it is done a *reasonable time before the trial.* Of course it is better, in order to save expense, to pay on the service of the subpœna. But, both by the English and by our law, a witness should object to the insufficiency at the time the money is paid or tendered.[3]

It has been frequently decided also in England, though never with us, that to make a witness liable for the consequences of his non-attendance at the trial, there must be proof of a personal service on him of the subpœna;[4] and

[1] *Steenkamp and another* vs. *De Villiers and others*, 3 C. T., 104.

[2] Rule 315, pr. 17.

[3] 13, East 16, note to the case *Hallet* vs. *Meares and another; Gough* vs. *Miller*, 8 Jur. 758; *Fuller* vs. *Prentice*, 1 H. Bl., 49.

[4] *Thorpe* vs. *Gisbone*, 11 Moore, 55.

though the 33rd Rule says that service shall be made by delivering "to him" (the witness) a copy of the summons, yet this expression allows the service of the document on any one of his household, or even on his representative. I have found nothing directly in point on this head in the law of Holland; but inasmuch as a subpœna is on the same footing as an order of Court, and its disregard subjects the witness to criminal consequences also, the principles of the criminal law require that a process of the Court should, in such a case, be served personally; and the English decisions hereon, being founded on similar principles, would be followed here.

In the case of the *Queen* vs. *Van Niekerk*, decided in 1871, not reported, the defendant kept a bottle store in Namaqualand, but had appointed a son of his by general power of attorney to manage the store during his absence from the Colony. The son sold a bottle of brandy without the licence being renewed; a summons was issued against the father, served on the son, and judgment given against the former for £20 or three months' imprisonment, as it was a second conviction. On appeal to the Supreme Court the sentence was quashed on the ground that Van Niekerk, sen., was not personally served with the summons, nor was he present at the trial.

The mode of service of a subpœna on a witness is "by delivering to him a copy of the said summons and *at the same time* shewing him the original and informing him of the exigency thereof.[1] Anyone not so served cannot be attached for contempt.[2] For the time of, and returns to, service are the same as in "Summonses" (for which see Chapter thereon).

A subpœna cannot be issued or served until the trial day is definitely known; the best proof of this being the day for which the case has been set down for trial. It is not necessary that a subpœna should be served through the Sheriff. It is not even addressed to the Sheriff. Anyone may serve it; the attorney or his clerk, or anyone else. If served through the Sheriff, his certificate or return of service is sufficient. If served through or by anyone else, an affidavit

[1] Rule of Court 33. [2] *Ritcher* vs. *King*, 9 Jur., 348.

of service is necessary, which affidavit is more or less in the same form as the Sheriff's return mentioned in the Chapter on Summonses. There is no reason in law for this distinction, except that the Court must have proof of service, and for this proof they have always been satisfied with the Sheriff's return of service, because by law in serving other summonses he has to make his certificate or return his service; whereas in cases of service by other parties of such documents as they can serve, they must either give *vivâ voce* evidence of service or make an affidavit.

A witness who is duly subpœnaed to attend and give evidence before a Commissioner appointed by any competent Court, whether the Commission be Colonial or from a Foreign Tribunal, is entitled to the same privileges and subject to the same disabilities as he would be if a Court had subpœnaed him to attend a trial. But the Commissioner cannot compel the appearance of a witness or punish for contempt; this can be done only by the Court from which the subpœna issues for the witness's attendance. If the Commission should be from a Foreign Tribunal, the Supreme Court here will grant authority for a subpœna to be issued to compel the attendance of a witness before the Commissioner appointed;[1] see the subject fully treated in Chapter on "*Commission de bene esse.*"

But though, as a general rule, a Commissioner cannot punish a witness for contempt, the exception is in the case of an Insolvent who has been subpœnaed to give evidence before a Commissioner "touching all matters relating to his estate;" if he fails to attend, the Commissioner may grant a warrant for his apprehension and detention in gaol till he shall have given his evidence.[2]

The Magistrates' Courts have no power to grant Commissions, but they may issue Interrogatories to be answered by a witness before a Magistrate in another district, and if the witness on being duly subpœnaed fails to answer such interrogatories, he can be punished by that Magistrate.[3]

[1] *Hesslopp and another* vs. *Hamilton*, in 1876; *Dunell, Ebden & Co.* vs. *Goldschmidt*, in 1878; and *Bowstead & Co.* vs. *Owners of vessel "August" and another*, decided in July, 1890, none of which is reported.

[2] §§ 62 and 63 Insolvent Ordinance.

[3] § 52 of Act 20 of 1856.

An arbitrator has no power to subpœna a witness, nor can a witness be subpœnaed to appear before an arbitrator except in the case of expropriation of land for public works, when an order of Court can be obtained for his appearance.[1]

A subpœna can be issued only out of the Court where the case is to be tried, and it can only command the attendance of a witness who is within the jurisdiction of that Court. If, then, a witness who is out of the jurisdiction of either the Eastern Districts' or Griqualand West or any of the Circuit Courts, is required to give evidence before any such Court, the process of the Supreme Court is required in aid of the jurisdiction of the lower Court. This does not apply to Magistrates' Courts. But a process in aid of a Circuit Court within the jurisdiction of the Eastern Districts and Griqualand West Courts may be obtained also from those Courts respectively. To obtain this process in aid a subpœna must first be issued out of the lower Court, and then submitted to the Registrar of the Supreme Court in Cape Town, and elsewhere to any Judge of the Supreme Court, who thereupon issues the supervening subpœna,[2] and a copy of each subpœna is served on the witness. But a subpœna issued out of the Supreme Court may command the attendance of a witness from any one part to any other part of the Colony.[3]

But if a witness in the district of one Magistrate has to give evidence before a Magistrate in another district, this process in aid is not required. The Magistrate before whom he is to appear issues the usual subpœna, and sends it to the Magistrate in whose district the witness resides, who then countersigns it, and when duly served by any person authorised thereto, the witness is bound to attend precisely as though he resided within the district of the Magistrate who issued the subpœna.[4]

But though the general rule is that a person cannot be compelled to attend as a witness before a Court that has no jurisdiction over him, provision is now made by Act 12 of 1886 to subpœna witnesses to attend at the Courts of

[1] Act 6 of 1882, § 3, par. 13.
[2] Rule 188; Act 21 of 1864, § 33; and Act 39 of 1877, § 17.
[3] See Chapter "*Process in Aid.*"
[4] § 52 of Act 20 of 1856.

neighbouring States and Colonies to give evidence, and such subpœnas are served in this Colony through the Magistrates in whose district the witness resides. Whichever of the States may have made a similar provision, will come under this Act, and the witnesses in each such State can be subpœnaed by us to attend our Courts. The following have since made similar provisions, viz., the Orange Free State, the S. A. Republic, Basutoland, and the native territories. Each party to a suit may obtain as many subpœnas as he requires for the attendance of his witnesses at the trial.

Subpœnas should be signed and issued by the Registrars of the respective Courts where the witnesses are to appear; but a Circuit Court subpœna may be issued by the Registrar of Circuit, or the Clerk of any Circuit Judge, or by the Clerk of the Magistrate within the limit of his district, or even by the Registrar of the Supreme Court.[1] In the Magistrates' Courts the subpœnas are signed and issued by the Magistrates' Clerks.[2] In the Supreme or Eastern Districts or Griqualand West Courts each subpœna shall contain the names of only four witnesses;[3] while for a subpœna in the Circuit Courts no number is fixed; thus we fall back on the Common Law, where there is no limited number, and in the Magistrates' Court also no number is fixed for a subpœna. The Rule 18 to Schedule B says "together with the said summons so *many copies thereof as there are witnesses to be summoned.*"

The only reason for inserting four names in a subpœna in the three higher Courts named must be for revenue purposes, while their omission from Circuit or Magistrates' Courts must be either accidental as regards the Circuit Courts, or to lessen the expense as regards the Resident Magistrates' Courts. In England the names of only three witnesses can be put in a subpœna. For not appearing at a trial or before a Commission, when duly subpœnaed, the higher Courts have discretionary power under the common law to fine and imprison, unlimitedly, in addition to ordering

[1] Rules 162, 163, 223 and 379.
[2] Rules 16 and 17 to Schedule B of Act 20 of 1856.
[3] Rule 33; § 20 of Act 21 of 1864; and § 17 of Act 30 of 1877.

a warrant of apprehension to be issued for the immediate arrest and attendance of the witness.[1] But the power of the Magistrates' Courts is limited to a fine not exceeding £5, or in default of payment to imprisonment not exceeding 14 days; and the Magistrate may in addition issue his warrant for the apprehension of the witness to be brought up to give his evidence.[2]

If, on the trial of any case before any of the higher Courts or Circuit Courts, or before a Commissioner, a witness is in Court or in the box but refuses to give his evidence, for no reason satisfactory to the Court, he may be imprisoned or fined, or both, at the discretion of the Court, and detained in prison till he gives his evidence.[3] But in the Magistrates' Courts such conduct must be punished as contempt by misbehaviour[4] except in criminal cases, when the Magistrate can detain the witness in prison till he does answer the questions.[5]

Every witness duly subpœnaed must attend the trial from day to day till its conclusion, unless he is *earlier* discharged. His failure to do so subjects him to punishment at the discretion of the Court.[6]

If a witness who is duly subpœnaed endeavours to fly the country, he may be arrested by order of the Court or of a Judge.[7] If a witness who is subpœnaed on the good faith of the evidence he is to give, gives wholly different evidence, he is not entitled to his expenses.[8] If a witness in gaol is subpœnaed, arrangement should be made with the Magistrate under whose charge the gaol is, or if at a Convict Station, then with the Superintendent of the Convicts of that Station, to have him produced at the trial. Otherwise an order of Court or of a Judge, upon an affidavit stating the place and cause of confinement of the witness and that his evidence is material, may be obtained for the production of the witness at the trial. In any case the party subpœnaing the witness must

[1] For Circuit Court see Rule 169.

[2] Rule 18 to Schedule B of Mag. Ct. Act.

[3] *Re Mrs. Gracie*, in the case of *Fitzgerald* vs. *Fitzgerald*, decided in 1872, not reported.

[4] § 54, R. M. C. Act.

[5] § 31 of Ord. 40.

[6] *Scholes* vs. *Hilton*, 10 M. and W. 15; 2 Dowling N. S., 229.

[7] See Chapter "*Arrests*."

[8] See Chapter "*Costs*."

also pay the expenses of the constable in whose charge the witness may go to Court, and these additional charges will also form part of the costs in the case.[1]

A witness duly subpœnaed cannot be arrested in a civil matter on his way to or from or while attending Court; but on being arrested he must exhibit his subpœna, if he wishes to be free of arrest.[2] No person is exempt from being subpœnaed to attend a trial, excepting the Governor and Judges, against whom "no process may be issued" without leave of the Court; but if this leave is given, they are not privileged. Soldiers and sailors in war are exempted during war. This of course does not apply to the "excuses" of other people, which it is in the Court's discretion to entertain or not.[3]

Any suitor may subpœna his opponent to give evidence in the cause.[4]

In the taxation of a witness's expenses, the fact that his salary or wages, or means of income, go on as usual without any loss or diminution to him should not be taken into consideration, but his expenses and allowance should be taxed according to tariff, irrespective of these advantages.[5]

The principle that a witness is to be paid his expenses by the party calling him is derived from the Roman law[6]; but that party can recover the amount from his adversary condemned to pay the costs.

One party to a suit cannot avail himself of a subpœna served on a witness by the opposite party, in case the latter should not call him; and therefore, in order to insure the attendance of a witness, he likewise must subpœna him, though his opponent may have done so already. If the witness has been subpœnaed by both parties, he cannot claim his expenses in full from each, so as to amount to double; but must either claim his full expenses from one, or *pro ratâ* from both; and if both should have prepaid his expenses in full, the suitor exempted from costs of the action can recover

[1] Taylor on Evidence, §§ 1148 and 1152.
[2] See Chapter "*Arrests*."
[3] Merula 4, 65, 4; and Rule of Court 9.
[4] Act 4 of 1861, §§ 6 and 9.
[5] Merula 4, 65, 15.
[6] C. 4, 20, 11 and Nov. 90, 9.

from the witness all he paid him in advance.[1] The attorney of the party on whose behalf a witness has been subpœnaed is not liable for the witness's expenses, unless he has expressly pledged his credit for the payment of them; but the witness has his action for his expenses against the party who had him subpœnaed to attend the trial.[2]

Subpœna containing a clause of duces tecum.

(Heading.)

We command you, that laying aside all and singular business and excuses, you, and every one of you, be and appear personally before our Justices of our Supreme Court of our Colony of the Cape of Good Hope, at Cape Town, on the . . . . day of . . . . at ten o'clock in the forenoon of the same day (*if any of them is to produce any documents, then add* "and that you the said C.D. . . . . bring with you and produce, at the time and place aforesaid, certain contract between you and the plaintiff bearing date the . . . . day of . . . . and also the accounts rendered by him to you concerning this case, and your correspondence with him therein"), then and there to testify and shew all and singular these things which you, or any of you, know concerning a certain cause now pending in our Supreme Court, at Cape Town, between K.L. plaintiff and M.N. defendant, wherein the said (*here put the cause of action, as for instance*) plaintiff claims the sum of £ . . . . balance of account current between him and the defendant: on the part of the said defendant (or plaintiff); and this you, or any of you, shall by no means omit, under the penalty upon each of you, of one hundred pounds sterling.

Witness, &c.

Subpœna to appear before a Commissioner in Insolvency.

(Heading.)

We command you, that laying aside all and singular business and excuses, you, and every one of you, be and appear personally before E.F. Esq., a Commissioner of the Supreme Court of our Colony of the Cape of Good Hope, at . . . . on the . . . . day of . . . . at ten o'clock in the forenoon, then and there to be examined concerning the person, trade, dealings and estate of G.H. . . . . of . . . . now an insolvent according to law; and also that you, the said A.B., bring with you at the time and place aforesaid all vouchers, correspondence, and other documents concerning the said insolvent estate. And herein fail not at your peril.

Witness, &c.

[1] See the principle in Rule 315, and consult *Allen* vs. *Yoxall*, 1 C. and K., 315; *Hala* vs. *Bates*, E.B. and E., 575; 28 L. J., Q. B. 14.

[2] *Robins* vs. *Bridge*, 3 M. and W., 114.

(NOTE.—*A subpœna to attend before a Commissioner of a Foreign Tribunal to be in the same form, substituting for the words "Commissioner of the Supreme Court," &c., the words "a Commissioner of the Court of" (say, for instance, "Probate and Matrimonial Causes in England," &c.)*

Circuit Court subpœna.

(Heading.)

We command you, that laying aside all and singular business and excuses, you, and every one of you, be and appear personally before the Judge of our Circuit Court for the division of . . . . to be holden at . . . . on . . . . the . . . . day of . . . . at ten o'clock in the forenoon precisely; and also that you bring with you, and produce, at the time and place aforesaid (*here say what books or documents*)—then and there to testify and shew all and singular those things which you, or any of you, know concerning a certain cause now pending in our said Circuit Court, between . . . . plaintiff, and . . . . defendant, wherein the said . . . . complains (*here briefly give cause of action*), on the part of the . . . . ; and this you, or any of you, shall by no means omit, under the penalty, upon each of you, of one hundred pounds sterling.

Witness :—The Honourable . . . . one of the Judges of the Supreme Court of our Colony of the Cape of Good Hope, at . . . . the . . . . day of . . . .

. . . . . .

Registrar of the Supreme Court
(or Clerk to the Resident Magistrate).

Affidavit by a witness duly subpœnaed to be excused from attending the trial, or for an order to be examined before a Commissioner.

(Heading of case.)

1. I, A.B. of . . . . make oath and say :—

That I have been subpœnaed at the suit of . . . . the above defendant, to attend this trial at Cape Town on the . . . . day of . . . .

2. I have informed the defendant that owing to my old age and ill health I cannot attend the trial, but he replied that I must, and that if I did not attend he would have me punished for contempt of Court.

3. I say further that I am now 82 years of age, and never had and have not now a medical attendant. That in an accident I had last year by the upsetting of my cart I fell with my head against a stone, in consequence of which I have ever since suffered severe pains in my head, and often feel very giddy and generally very weak, and that I have for some time past ceased to travel either by cart or on horseback, as the jolting of the cart causes greater pain, and being on horseback increases my giddiness, and I am therefore unable to attend the trial.

Sworn at . . . . &c.

Petition by a witness who has been fined for contempt of Court for a remission of the fine.

(Heading.)

The petition of A.B. of . . . .

Humbly sheweth—

1. That your petitioner was subpœnaed by the plaintiff in the case of . . . . vs. . . . . and that on your petitioner's name being called at the trial of the said case on the . . . . day of . . . ., not answering thereto, he was fined by this Honourable Court in the sum of £ . . . .

2. Your petitioner says he had no intention of treating the subpœna, or this Honourable Court, with contempt, and (*here give the reasons for absence*) as proof thereof he says he had engaged his passage by the post-cart which was to leave the village of . . . . on the . . . . day of . . . ., and that he was duly in attendance to take his seat on the departure of the cart. But that on the arrival of the cart at the said village it was found that it was very heavily laden with the English mails, and that in consequence the post-contractor refused to allow your petitioner to take his seat.

3. Your petitioner represented to the said contractor that he was under subpœna to attend this Honourable Court by the . . . . day of . . . ., but the contractor replied that in terms of his contract with the Government he could carry no passengers when the mails were heavy, in order not to delay the mail.

4. Your petitioner further saith that he engaged his passage by the post-cart as that was the cheapest way to reach the Court, and the post-cart takes 19 consecutive hours to do the distance, whereas a private conveyance is expensive, and could not do the same distance under three days.

5. That finding he could not take his seat by the post-cart, your petitioner made every endeavour, till late that night, to engage a cart and four horses to travel night and day in order to reach the Court in time, but no one would let his horses for such a fast journey.

6. For these reasons, your petitioner respectfully submits he had no intention of being absent from the trial, or of treating the process of the Court with contempt or disrespect; but that if your Lordships should hold the grounds for his non-attendance to be insufficient, then he hereby expresses his sincere regret and hereby tenders his apology to this Honourable Court, and craves their indulgence.

Wherefore your petitioner humbly prays that your Lordships may be pleased to declare these grounds for his non-attendance at the trial to be satisfactorily explained, and that you will be pleased further to accept his apology and to order a remission of the fine imposed upon him.

And your petitioner as in duty bound will ever pray.

(*Affidavit of Verification.*)

CHAPTER XI.

PROCESS IN AID.

A PROCESS in Aid is an authority from a higher tribunal to supplement the jurisdiction of a Circuit Court in the instances specified below. Thus, if it is necessary to summon a defendant in any civil suit in the Circuit Court for any district other than that in which he has his domicile (the process of the Circuit Court being itself insufficient, as no Circuit Court has jurisdiction beyond its proclaimed limits), the process of the Supreme Court "in Aid" is required; but such a defendant can be summoned from his own to another district in only those cases which relate to any right in, over, or in respect of, any land or other immovable property situate in such other district, but to none other.[1]

Where a person has to be subpœnaed, whether in a civil or in a criminal case, to attend at a Circuit Court for a district other than that in which he resides (the Circuit Court process being ineffectual for subpœnaing such a person), the process of the Supreme Court in aid of the jurisdiction of such Circuit Court is necessary.[2]

In all cases where a judgment of the Circuit Court has to be executed, the writ issued of that Court is in force only within that Circuit Court's jurisdiction. If then either the defendant, or his property, is in another district, the writ cannot be executed there without a Process "in Aid."[3] But there is nothing to prevent the writ being issued out of the Supreme Court direct, when once the records of the case are there.[4]

[1] Rule of Court 160.
[2] Rule 188.
[3] Rule 188.
[4] See Chapter "*Writs of Execution.*"

To obtain a Process in Aid, the summons, or subpœna, or writ of execution, whichever it may be, must first be duly issued in the Circuit Court; then, on being exhibited to the Registrar of the Supreme Court, he will sign and issue the Process in Aid: a Process in Aid may be signed also by a Judge on Circuit.[1]

The Process in Aid of the Circuit Courts in the Eastern Districts may be issued out of the E. D. Court[2] as well as out of the Supreme Court, because the Supreme Court has jurisdiction over all the Colony; but in the Western Districts it can be issued only out of the Supreme Court.

A copy of the Process in Aid must be served with the summons on a defendant, or with the subpœna on a witness.

The only other instance of Process in Aid in our practice is under the English Bankruptcy Act of 1869. By the 74th section of that Act it is provided that—

"British Courts and their officers shall severally act *in aid of, and* "*be auxiliary to, each other in all matters of Bankruptcy;* and an "order of the Court seeking aid, together *with a request to another* of the "said Courts, shall be deemed sufficient to enable the latter Court to "exercise, in regard to matters directed by such order, the like jurisdiction "*which the Court which made the request,* as well as the Court to which "the request is made, could exercise in regard to similar matters within "their respective jurisdictions."

In terms of this section the English Bankruptcy Court granted an order in December, 1883, in which a

"request was made seeking the aid of the Courts in this Colony which "have jurisdiction in insolvency, or bankruptcy, to be auxiliary to the "English Court for the purpose of recognising the appointment of the "English Trustees of the insolvent estate of Howse, Sons & Co., and "generally to exercise the like jurisdiction which the English Court could "exercise in regard to similar matters within the said Court's jurisdiction."

Our Supreme Court in February, 1884 (not reported), acting on this request, gave an order, not only to recognise the English order, but even cancelled the Colonial sequestration of the estate, including the appointment of the Trustees thereunder, and vested all the movable assets of the estate

[1] Rule 188.

[2] Act 21 of 1864, s. 20, sub-ss. 1 and 2.

in the English Trustees. By virtue of the same section, again, our Supreme Court and the Griqualand West Court, in November, 1886, granted similar orders *seeking the aid of the English Bankruptcy Courts and requesting them to recognise, as Trustees in England,* the appointment of Colonial Trustees in the insolvent estate of Christopher Firbank, and of the estate of Firbank, Pauling & Co. (neither of which is reported).[1]

The application here is by petition to the Court by the Trustees, setting forth the circumstances why they wished to be recognised as such in England; and concluding with a prayer:—

1. To act in aid.

2. To declare the property (in England) vested in the Colonial Trustees.

3. To order that the administration be proceeded with by the Trustees, or by their lawfully appointed agents; and

4. For general relief, &c.

The Supreme Court has confirmed the appointment of a trustee elected in Griqualand West, and appointed by the High Court there, for the purpose of enabling him to dispose of landed property in this Colony beyond the jurisdiction of the said High Court.[2]

Process in Aid to compel appearance of a defendant in another division than that in which he is domiciled.

(Heading.)

Whereas a summons for the Circuit Court for the division of . . . ., bearing date the . . . . day of . . . ., has been issued, whereby you are commanded to summon A.B. of . . . . in the division of . . . ., that he appear before our Judge of our Circuit Court for the division of . . . . of our Colony of the Cape of Good Hope, to be held at . . . . on the first day of the sitting of the said Court at nine o'clock in the forenoon, then and there to answer C.D. of . . . . in an action (*here briefly describe cause of action, for instance*) to have it declared that a certain fence across the farm Papiesfontein, in the division of . . . ., the property of the said A.B., is contrary to the deed of sale and purchase, between the said A.B. and the said C.D., of the said farm and should be removed, as upon further reference to the said summons of the said Circuit Court will more fully appear.

[1] See also *Estate Howse & Co.*, 3 E.D.C., 367; *Ross and another* vs. *Saber Brothers*, 2 G., 1; and Chapter "*Commissions de bene esse.*"

[2] *Re O'Connell*, 10 J., 62.

And whereas the said summons of our said Circuit Court is ineffectual for suing the said A.B. by reason of his residing in the division of . . . ., and over which our said Circuit Court hath no jurisdiction, and the process of our Supreme Court of our said Colony is required in aid of the jurisdiction of our said Circuit Court—

Now therefore command the said A.B. that he appear before our Judge of our said Circuit Court at the time and place mentioned in the said summons according to the exigency thereof, and that he omit not so to do at his peril.

Witness, &c.

Process in Aid to compel the attendance of witnesses in a division where they are not domiciled.

(Heading.)

Whereas a subpœna for the Circuit Court of the division of . . . ., bearing date the . . . . day of . . . . has been issued, whereby A. B. C. and D. are commanded that, laying aside all and singular business and excuses, they and each of them be, and appear, personally before our Judge of our said Circuit Court in, and for, the division of . . . . of our said Colony of the Cape of Good Hope, to be holden at . . . . on the . . . . day of . . . . at nine o'clock in the forenoon precisely, then and there to testify and shew all and singular these things which they or either of them know concerning a certain cause now pending in our said Circuit Court between . . . . plaintiff; and . . . . defendant, on the part of the (*plaintiff?* or *defendant?*), and which command they and each of them were by no means to omit (to obey) under a penalty upon each of them of £100 sterling.

And whereas the process of the said Court is ineffectual for summoning A. B. C. and D. by reason of their residing in the division of . . . ., within which the said Circuit Court for . . . . hath no jurisdiction; and the process of our Supreme Court of our Colony of the Cape of Good Hope is required in aid of the jurisdiction of the said Circuit Court.

Now therefore command the said A. B. C. and D. that they and each of them do obey the process of our said Circuit Court to be holden in and for the division of . . . . at the time and place last aforesaid according to the exigency of the said process, under the penalty therein specified.

Witness, &c.

(Rule 188.)

Process in Aid for the execution of a judgment of a Circuit Court in another division than that where the judgment was given.

(Heading.)

Whereas a writ of execution for the Circuit Court for the division of . . . ., bearing date the . . . . day of . . . . has been issued, whereby you are commanded that of the goods and chattels of A.B. of . . . . in the division of . . . ., you cause to be raised the sum of £ . . . . sterling, with interest thereon from the . . . . day of . . . . to the day of levy, which C.D. of . . . .

in our Circuit Court holden in and for the division of .... in this Colony on the .... day of .... before the Honourable .... one of our Judges of our said Colony, recovered (*provisionally?* or *finally?*) by a sentence of our said Circuit Court against the said A.B., together with the sum of £ .... sterling for the taxed costs and charges of the said C.D. by him about his suit in that behalf expended.

And whereas the said writ of execution of the said Court is ineffectual for attaching the goods and chattels of the said A.B. in any division other than that of .... out of which the said Circuit Court for .... hath no jurisdiction; and the process of the Supreme Court of our Colony is required in aid of the jurisdiction of our said Circuit Court.

Now therefore these are to command you that, of the goods and chattels of the said A.B., you cause to be made the respective sums of money aforesaid according to the exigency of the said writ of execution, together with the further sum of £ .... for the costs of this process.

And have you that money before the Justices of our Supreme Court at Cape Town on the .... day of .... next, to be rendered to the said C.D. (*if the sentence was provisional then add, but if final then omit, the following words*) upon sufficient security being given by the said C.D. if in the principal case the said sentence be reversed.

And have there this writ, &c.

Witness, &c.

Petition by the trustees of an insolvent estate in this Colony to the Supreme Court for Process in Aid in England.

(Heading.)

In the matter of the insolvent estate of C. and G., trading as C. G. & Co.

To the Judges of the Honourable the Supreme Court of the Colony of the Cape of Good Hope.

The petition of D. P. and W. K. in their capacity as trustees of the above-named insolvent estate;

Humbly sheweth—

1. That the estate of C. and G., trading together under the style or firm of C. G. & Co., was, on the .... day of .... provisionally sequestrated, and on the .... day of .... finally adjudicated as insolvent by this Honourable Court.

2. Thereafter your petitioners were duly appointed trustees in the usual manner, their election as such trustees being confirmed by this Honourable Court on the .... day of ....

3. By virtue of the said election and appointment, your petitioners entered upon their duties as trustees of the said insolvent estate and discovered that the said C. and G., who had, prior to their entering into a contract for the construction of the A .... Railway under the style or firm of C. G. & Co., been engaged as sole partners under the style or firm of C. & Co. in the construction of the B .... Railway, had had considerable financial transactions in England in connection with the said

railways, and otherwise; and that the said C. is the registered holder of a large amount of scrip and debentures of the C . . . . Railway Co.

4. The said scrip and debentures, as also certain claims against the said C . . . . Railway Co., although nominally vested in C., have by him been declared to belong to himself and G., trading in partnership as C. G. & Co., and have been included in the assets mentioned in the schedules of the said firm.

5. Your petitioners have ascertained that some of the assets are held by creditors in England as security for alleged loans; and some are said to be held for safe keeping for account of the said C.

6. Your petitioners verily believe that no sequestration proceedings have been taken against the said C. and G., individually, or as a firm, in England.

7. Your petitioners are advised and believe that, by virtue of the sequestration in the first paragraph hereof mentioned, and their appointment as aforesaid, they are vested with the title to all the assets of the said insolvents (not being real estate) in England and elsewhere.

8. Your petitioners have, through their agent in London, demanded delivery of the assets in England, but are informed by their said agent that the persons holding the said assets refuse to recognise their title thereto, alleging that the sequestration in this Colony in nowise affects English creditors or property.

9. Your petitioners deem it essential to the interests of creditors that the assets should be administered by one set of trustees; the more so as the scrip and debentures aforesaid relate to a railway situate in this Colony; and they fear that great confusion and difficulty would arise if they were debarred from administering the whole estate, including the English assets.

10. Your petitioners desire to have it declared that, by virtue of their appointment aforesaid, they are vested with the title to the assets in England as aforesaid, and are entitled to administer the same under the bankruptcy according to law;

Wherefore they humbly pray that your Lordships may be pleased to grant an order that aid be sought from the Courts in England requesting the said Courts, and especially such Courts as have jurisdiction in bankruptcy, to act in aid of, and be auxiliary to, this Court for the purpose of recognising the appointment of the said D.P. and W.K. as trustees of the estate and effects of the above-named insolvents, and their title to administer the same; and generally to exercise the like jurisdiction which this Court could exercise in regard to this matter and similar matters within the said Court's jurisdiction; and your petitioners as in duty bound will ever pray.

(*Affidavit of Verification.*)

Petition by the trustees in this Colony to the Bankruptcy Court in London, to give effect to the Process in Aid granted by the Supreme Court here, in terms of the foregoing petition.

In the London Bankruptcy Court.

To His Majesty's Judges in the London Bankruptcy Court.

In the matter of the insolvent estate of C. and G., trading as C.G. and Company.

The petition of D.P. and W.K. in their capacity as joint trustees of the above-named insolvents trading as aforesaid,

Humbly sheweth—

1. That C. and G. carried on business in the Colony of the Cape of Good Hope in co-partnership as railway contractors, under the style or firm of C. G. & Co., during the year . . . . .

2. That prior to the year . . . . the said C. and G. carried on business under the style or firm of C. and Company, they being the sole partners in both the firms of C. & Co. and C. G. & Co.

3. The firm of C. & Co. entered into a contract for the construction, for the Colonial Government, of a railway known as the A . . . . Railway, and had large financial transactions in connection therewith.

4. Thereafter, having changed the name of their firm from C. & Co. to C. G. & Co., the said insolvents entered into a contract with the Government of this Colony for the construction of the B . . . . Railway extension line, and had large financial transactions in connection with the said railway.

5. The said C. and G. also did work for and lent money to the contractor for the construction of the line of railway known as the C . . . Railway, which is situated in the said Colony.

6. The said C. and G. also had financial transactions in England in connection with their business and the aforesaid railways, both those constructed or partly constructed, while they traded as C. G. & Co.; and your petitioners believe that some of those transactions, while they were strictly in connection with the firm's business, were entered into in the name of C. alone.

7. Your petitioners have learned that the said C. is, according to the books of the C . . . . Railway Company, which has an office in London, the registered owner of a large amount of scrip and debentures of the said Company. This scrip, though registered in the name of one of the said insolvents, has been declared by the said C. to belong to the firm of C. G. & Co., as well as the debentures.

8. Certain other scrip registered in his name is alleged to be pledged to Messrs. W. & Co., bankers, of Nottingham, for advances; while some scrip, so registered, is said to be deposited in the hands of the said bankers for safe keeping.

9. The said C. is also alleged to be the holder of certain shares in the Yorkshire Banking Company, for his firm.

10. The said C. on behalf of his said firm is the holder of a cession of certain claims alleged by the contractor for the C . . . . Railway against the Company.

11. There are other matters relating to the transactions of the said insolvents which require investigation; and your petitioners claim delivery and control of all books, papers, and documents relating to the affairs of the said firms.

12. On the . . . . day of . . . . the estate of C. and G., trading as C. G. & Company, was provisionally sequestrated; and on the . . . . day of . . . . was finally adjudicated as insolvent by the D . . . . Court, which is a Court within the said Colony having jurisdiction in insolvency or bankruptcy.

13. Thereafter your petitioners were duly elected, in accordance with the law of this Colony, to be the trustees in the said insolvent estate; and their said election was duly confirmed by the said Supreme Court on the . . . . day of . . . . Your petitioners have, ever since, acted as such trustees, and are now clothed with full authority as such trustees.

14. To the best of your petitioners' knowledge and belief no sequestration proceedings have been taken in England, or elsewhere, against the said insolvents, or either of them, save and except certain proceedings which resulted in the sequestration by the Supreme Court of this Colony of the private or individual estates of the said C. and G. respectively.

15. In regard to the assets registered in the name of the said C., although belonging to his firm, as sworn to in his schedules, the trustees of the said C. are acting in aid of the petitioners with the object of securing them for the benefit of the firm's creditors.

16. The contracts, out of which the liabilities of the said insolvents arose, were entered into in this Colony; and even the claims of the English creditors, or most of them, arise, your petitioners believe, in connection with the said Colonial contracts.

The C . . . . Railway, which is immovable property, and is the principal source from which, upon realisation, funds may come to satisfy the claims of creditors of the said insolvents, is situate in this Colony.

17. According to the sworn statements of the insolvents they have no real property or estate in England.

18. Your petitioners have through their agent in London claimed delivery of the books, records and assets of the said insolvents in England, but have been met by resistance on the ground that the sequestration and their appointment as trustees in this Colony have no effect in England. Your petitioners are advised and believe that, by virtue of the sequestration and their appointment as aforesaid, they are vested with the title to all movable or personal estate of the said insolvents.

Great confusion would arise if the affairs of the insolvents in this Colony and in England were administered by separate trustees, as they are complicated and arise out of the transactions hereinbefore mentioned.

19. Your petitioners, being desirous of having their appointment as trustees as aforesaid, and their right to deal with the assets and affairs of the said insolvents in England, recognised and confirmed by a competent Court in England, applied for and obtained from the Honourable the Supreme Court of this Colony, the Order which is hereunto annexed, marked "A," and your petitioners now crave aid and assistance as aforesaid.

And your petitioners as in duty bound will ever pray.

(*Affidavit of Verification.*)

CHAPTER XII.

DEFAULTS.

It is not intended here to refer to all the minor defaults to which parties to an action are liable, and which can be gathered from the respective subjects treated of; nor to a default in obeying an order of Court, which is treated of under the head of "Contempt of Court"; nor to a default in "Appeal," which is treated of under that heading; but only to the defaults of more general and frequent occurrence in actions.

A plaintiff, as well as a defendant, may be in default in an action.

1.—*Default of a Plaintiff.*

Generally, a plaintiff may be in default in three ways:

When he has issued summons, but does not proceed or declare thereon (this differs from "Perpetual Silence," which see further on).

When, after he has declared or made claim on the summons, he does not reply to the defendant's plea or any further pleadings.

When his case is called on the roll, and he does not appear, nor anyone for him (this is called "*Comparuit* Default").

(*a*) In the first case, when a plaintiff has issued his summons and the defendant has entered appearance thereto, but the former does not proceed with his action, or declare and make claim "within the term next after that in which the action was commenced, or, in case the action shall have

been commenced out of term, then within the second term after the commencement of the action," the defendant may bar him from proceeding, and then move the Court, upon notice of motion, to "have judgment signed against the plaintiff for not proceeding in the said cause."[1] If the plaintiff opposes this application, it is in the discretion of the Court to grant, or refuse, or postpone it, or to order him to declare, or make claim, on his summons by a fixed date, and to go to trial within a certain period. If he does not oppose the application, it will be granted as a matter of course. But, whether the application is opposed or not, the effect of a judgment signed against a plaintiff for not declaring, or making claim, within the time fixed by the said Rules, is tantamount to one of absolution from the instance; and the plaintiff may either, upon notice of motion to the defendant, ask the Court for leave to purge his default and to file his declaration, or he may, without previous notice, issue a fresh summons, and then begin his action *de novo*, upon first paying, of course, any costs the defendant may have been condemned in.[2]

(*b*) If within the time fixed for the plaintiff to reply to any of the defendant's pleadings he does not do so, he may, after the expiration of 24 hours after demand of such replication or other pleading, be barred from replying or filing any further pleading. He may, however, after such bar, upon 48 hours' notice to the defendant of an application to the Court or a Judge, obtain leave to purge his default, and to plead. On the other hand, he may also, before being barred, anticipate the defendant's proceeding to bar him, and ask the Court for an extension of time to declare, or make claim, or to plead. To obtain any of these privileges he must satisfy the Court, or Judge, who has a wide discretion in the matter, upon an affidavit of merits, that his application is reasonable and just.[3]

(*c*) *Comparuit* Default.—This is when a case has been set down on the roll for trial, and on the trial day, when the

[1] Rules of Court 25 and 330*a*.

[2] *Eksteen* vs. *Hayward and Higginson*, and *Potgieter and Tennant* vs. *Meyer and another*, 3 M., 421, 438; *South West Diamond Mining Co.* vs. *Hall*, 1 A., 221; *Basson* vs. *Schickerling*, 10 J., 126.

[3] Rules 21, 23, 26, 27 and 147.

case is called, the plaintiff fails to appear, or anyone on his behalf. He is then held to be in default, whereupon the defendant claims *Comparuit*—that is, he makes a declaration that he duly appeared on the case being called, and was prepared to proceed with the trial to answer the plaintiff's claim or demand, but that he could not by reason of the plaintiff's default.

The benefit to the defendant of this claim is absolution from the instance of the plaintiff's claim, with costs of the action. If the plaintiff, after this, wishes to proceed again against the defendant, he must begin *de novo* by issuing fresh summons, &c., and proceed in the same manner as if he had taken no steps in the matter before; provided, also, that he first pays the defendant his costs of *Comparuit* in the former case.[1]

This privilege of *Comparuit* applies to *all* the Courts in the Colony, and the 177th Rule of Court specially applies to Circuit Court *Comparuits*, in which the Court may, on sufficient cause shewn, postpone the case, or make other order therein.

If the defendant should also be in default, he has nothing to complain of; but if, though appearing, he should omit, or neglect, to apply for the benefit of *Comparuit* when the case is called, he may afterwards, by notice of motion, call upon the plaintiff for the payment of his costs of action, whereupon the Court may either grant the application, or make such other order thereon as, under the circumstances, may seem reasonable; and if the Court should order the plaintiff to proceed to trial by a certain day, the defendant would be entitled to his costs of the day in appearing when the case was called, and to the costs of the application.[2] No appeal is allowed from any sentence given against a party by his default.[3]

2.—*Default of a Defendant.*

The elaborate system of defaults of a defendant formerly in use has been done away with by the 273rd Rule of Court.

[1] Jud. Prac. 1, 2, 3, 9; and *Van der Liet* vs. *Executors of Karnspeck*, 3 M., 395; and *Horst* vs. *De Villiers*, 1 M., 126.

[2] See Chapter "*Costs*."

[3] Van der Linden, Law of Holland, 23, 1, 5, 5.

In the Chapter on "Edictal Citations" I have treated of the defaults of a defendant who is either out of the jurisdiction of the Court, or, if still within the jurisdiction, cannot be found to be served with any legal process.

Under the present heading I shall treat of the defaults of a defendant who is within the jurisdiction of the Court, and who can be duly served with any legal process. Such defaults are of two kinds:

When the defendant has entered no appearance to the action;

When he has entered appearance.

(*a*) Under the old practice, whether a defendant entered appearance or not, but did not defend, the plaintiff was bound to prove his case to the satisfaction of the Court, in the same manner as if the defendant were defending it. But this costly, and frequently useless, proceeding has been done away with in almost all suits but actions for damages and divorce, &c., which must still be proved to the satisfaction of the Court, though the defendant be in default. But by the 329th Rule of Court, if the defendant *does not enter appearance* within four days after the day prescribed in the summons for entering appearance, the plaintiff may, if his action is *for a debt, or a liquidated demand only*, set the case down for judgment on the summons, without any notice to the defendant. But such a judgment is, in the first instance, provisional in its nature, for the Court may set it aside, and allow the defendant to purge his default and defend the action, "upon sufficient cause shewn, and upon such terms as to costs, or otherwise, as the Court may deem expedient." In the case of *London and S. A. Exploration Company* vs. *De Beers*,[1] the Court held that the 329th Rule (d) applied only to the specific case of a plaintiff's claim being for a debt or a liquidated demand; and in several other cases the Court held that in addition to a satisfactory explanation of his default the defendant must satisfy the Court also as to a *primâ facie* good ground of defence. The rule does not define the expression "*liquidated* demand," but it means a certain fixed and ascertained sum, in contradistinction to a penalty, or damages, both of which

[1] 3 C. T., 287.

are uncertain and unascertained. Thus also where a summons claims, *inter alia*, £12 the *value of a ring* belonging to plaintiff, lost or mislaid by the defendant, the Court held it to be of a sufficiently liquidated nature to justify it in giving judgment.[1]

So also for *an account*, the Court held it to be covered by Rule 329d.[2]

What amounts to "sufficient cause" is entirely in the discretion of the Court, who must be satisfied that the defendant has a *bonâ fide* defence to the action, and that he has adduced sufficient grounds upon the merits to justify them in re-opening the case; he must shew, also, that he has not unnecessarily delayed in his application, but that he moved at the earliest opportunity, and within a reasonable time; otherwise, he would be regarded as having acquiesced in the judgment.[3]

So also a case may be re-opened when there is a *bonâ fide* mistake as to entering appearance.[4] But the privilege to have a judgment set aside is allowed only to the real defendant who was intended to be served, and not to a party who was served in error, or by mistake.[5] So also, to make a defendant liable and be bound by his default, it must be proved, or must not be capable of disproof, that his default is regular, that is, that the service of a summons, or other process, was proper, and was not defective.[6]

But when the plaintiff's claim is *not* for a debt or a liquidated demand as, for instance, in actions for divorce, or damages, &c., then he cannot get judgment on the summons by reason of the defendant's default of appearance, but must file his declaration and prove his action. In such a case there must be an endorsement on the declaration that it is "filed for default of appearance." A copy of the declaration is to be served on the defendant, with a written notice that

[1] *Warmsly* vs. *James*, 8 C. T., 149, and *Pohl* vs. *V. d. Sandt & Co.*, 9 C. T., 494.

[2] *Van Ryneveld* vs. *Van der Riet*, 17 S. C., 163.

[3] *Murtha* vs. *Gates*, and *Foote* vs. *Wolhuter*, 1 A. 268 and 461; and *Zapf* vs. *Provident Insurance and Trust Company*, 4 E.D.C., 17.

[4] *Haase & Co.* vs. *Malcolm's Trustee*, 5 C. T., 23.

[5] *Brink* vs. *Wilson and Glynn*, 1 J., 278.

[6] *Collison & Co.* vs. *Schmidt*, B. for 1868, p. 33; and *Foote* vs. *Wolhuter*, quoted above.

it is "filed for default of appearance, that he must plead, answer, or except thereto, or make claim in reconvention within . . . . days (the same time as is necessary in a summons.)"[1] If the defendant should not appear and plead, the plaintiff may bar him from so doing, and set the case down for trial, for default of appearance and plea of the defendant.[2] In a trial case, notice of trial should be given to the defendant, though he is in default of appearance and plea.[3]

(*b*) When the plaintiff's claim is for debt, or for a liquidated demand, or for the recovery of land, and the *defendant, though he has entered appearance, is in default of plea, and has been barred from pleading*, the Court may, without hearing any evidence, and without any notice of trial to the defendant, grant leave to the plaintiff to enter final judgment in terms of the declaration for the amount claimed with costs,[4] and such cases may be set down for judgment on any Court day.[5] Thus, also, in a case of the *cancellation of the sale of land*, the Court gave judgment on the declaration without hearing evidence;[6] and so, also, on a claim *for ejectment and arrear rent;*[7] and *for transfer of land and delivery of stock;*[8] and for the *delivery of certain documents.*[9]

If the defendant is in default of appearance and plea in a Circuit Court, the plaintiff's judgment has, in the first instance, the force only of any provisional sentence of such Court;[10] but, unless it is reversed or altered at the suit of the defendant,[11] or made final at the suit of the plaintiff, at the next Circuit Court of the same district,[12] then it becomes final at the expiration of a year from the date of the judgment;[13] but a provisional sentence in the higher Courts, whether the defendant be in default or oppose it, becomes final at the end of a month after levy made, under a writ of execution.[14]

[1] Rules 20, 328, 377, 331.
[2] Rules 20 and 319.
[3] Rules 30 and 374, and *Niehaus* vs. *Niehaus*, 1 C. T., 138; and *Badenhorst* vs. *Badenhorst*, 10 C. T., 398.
[4] Rules 319 and 329.
[5] Rule 338.
[6] *Barrow* vs. *Le Brun*, 5 J., 368.
[7] *Grundeling* vs. *Grundeling*, and *Oudtshoorn Municipality* vs. *Edmeades*, 3 J., 45 and 306; *L. & S. A. Exploration Company* vs. *Williams*, 4 J., 254.
[8] *Badenhorst* vs. *Badenhorst*, 10 C. T., 398.
[9] *Rautenbach* vs. *Will*, 10 C. T., 411.
[10] Rule 178.
[11] Rule 181.
[12] Rule 180.
[13] Rule 179.
[14] Rule 329.

A defendant sometimes enters appearance to an action with no intention of defending it, but in order either to gain more time, or to facilitate and cheapen the service of any further process in the case; but, with whatever object he enters appearance, he must plead to the plaintiff's claim within eight days after the service thereof, and 24 hours after demand of plea thereafter, unless the Court, or Judge, grants him further time; and in default thereof he is barred from pleading.[1] He may, however, before judgment, on 48 hours notice to the plaintiff, and by leave of the Court, or Judge, who must be satisfied on an affidavit of the facts as to the cause of the default, purge his default, and obtain leave to plead, upon such terms as the Court or Judge may impose.[2] But if he has been debarred from pleading, and the case has been set down for trial by reason of his default, he is not permitted, if the defaults are regular, to defend the action, or in any way to interfere in the trial.[3] But a defendant who has not yet been, but expects to be, barred by the plaintiff may anticipate him, and apply to the Judge for time to plead, or rejoin, and thereupon the Judge may grant such order as he thinks reasonable.[4]

The meaning of the expression "*defaults are regular*" is where the plaintiff has observed all the rules and formalities required of him in his process, and where the defendant has been duly served with all the requisite notices and process, and the required number of days he is entitled to under the summons to appear, or plead, or be barred, or to defend, have intervened and been allowed him, and he has no cause of complaint on the ground of any omission, irregularity, or short service. In case any of the defaults are not regular, or there is any other irregularity or impropriety in any proceeding in a case, the defendant need not wait till the case is called for trial in order to start his objections, but may do so at any time before, by notice of motion to the plaintiff to set aside such proceedings on the ground of irregularity.[5] As in the

[1] Rule 330*b*.

[2] Rules 26, 27, and 147; *King* vs. *Porter, Hodgson & Co.*, B. for 1879, p. 117; and *Lewin* vs. *Greef and others*, 3 C. T., 123.

[3] Rule 214; *Luck* vs. *Owen*, *Stoll* vs. *Crous*, 3 M., 456 and 549; and *Granville* vs. *Randall*, 2 E.D.C., 11.

[4] Rule 27.

[5] Rule 28.

case of a plaintiff, a defendant cannot appeal from any sentence given against him by default.

If a defendant is in a default of appearance in a Magistrate's Court and judgment is given against him and he wishes to re-open the case, he can do so only in the Court in which judgment was given against him although the plaintiff resides in a different district.[1]

Notice to sign judgment against plaintiff for his default.

(Heading of case.)

Sir, Take notice that application will be made to this Honourable Court, on behalf of the above defendant, on the . . . . day of . . . . at 10 o'clock a.m., for an order to have judgment signed against the said plaintiff, for not proceeding with this cause within the time fixed by the Rules of Court: and for the costs of this application.

Dated at . . . . this . . . . day . . . .

Yours . . . .

. . . . . .

Defendant's Attorneys.

To D.

. . . . . .

Plaintiff's Attorney.

Affidavit in support.

(Heading of case.)

I, A.B., attorney for the above defendant, make oath and say:—

1. That on the . . . . day of . . . . the plaintiff issued out of this Honourable Court a summons against the said defendant, commanding him to (*here state briefly cause of action, as for instance*) pay him the sum of £500 for damages for breach of contract, &c.

2. That on the . . . . day of . . . . I duly entered appearance on behalf of the said defendant, to defend the said action.

3. That the period fixed by the Rule of Court within which the plaintiff must proceed with his action has lapsed, and he has not yet filed his declaration or claim; and that I have this day barred him from declaring or making claim.

Sworn, &c.

Notice by plaintiff to purge his default to declare or make claim, after he has been barred, but before judgment was signed against him.

(Heading.)

Sir, Take notice that application will be made to this Honourable Court on behalf of the above plaintiff on . . . . the . . . . day of . . . . at

[1] *Mardt* vs. *Hickem & Co.*, 12 S. C., 448.

10 o'clock a.m. for leave to purge his default in this cause, and to file his declaration or claim.

Dated at Cape Town this . . . . day of . . . .

. . . . . .
Plaintiff's Attorneys.

To
. . . . . .
Defendant's Attorney.

Affidavit in support.

(Heading.)

I, A.B. of Cape Town, attorney for the said plaintiff, make oath and say :—

1. That on the . . . . day of . . . . the plaintiff was barred by the defendant from declaring or making claim in this action, by reason that he did not do so within the time fixed by the Rules of Court.

2. I say that before the plaintiff could safely plead, it was necessary to get certain information from C., who was formerly his book-keeper, whose address was not known till recently, when I found out that he had left the Colony in April last, for Fort Salisbury in Mashonaland. That immediately upon obtaining this information, I wrote to C. for full particulars, and expect, in the ordinary course of the post, to hear from him by the end of this month (*or*, 2nd. That in consequence of the defence raised by the defendant, in his correspondence, as to the kind and quality of the tea sold to him, the plaintiff has had to write to his London correspondents for information, who in turn say that they have had to write to China for the information required, which, when obtained, they would communicate to plaintiff, and that no sufficient time has elapsed to hear from China : and that until such information be obtained, the plaintiff cannot safely file his declaration of action).

Sworn, &c.

Notice by defendant to purge his default where judgment has already been given against him, under the 329th Rule of Court; and for leave to defend the action.

(Heading.)

Sir, Take notice that application will be made to this Honourable Court on . . . . the . . . . day of . . . . at 10 o'clock in the forenoon, on behalf of the defendant, at which time you will be required to shew cause, if any, why the judgment given in this case on the . . . . day of . . . . last past, at the suit of the plaintiff, and by reason of the defendant's default of appearance, shall not be set aside, and the defendant be allowed to purge his default and defend the action on the grounds set forth in the annexed affidavit.

Dated at Cape Town.

Yours, &c.

. . . . . .
Defendant's Attorneys.

To
. . . . . .
Plaintiff's Attorneys.

Affidavit in support.

I, A.B., the defendant in the above case, make oath and say :—

1. That the summons in this case was on the . . . . day of . . . . served at No. . . . . Street, Cape Town, and the return of service by the Sheriff says "the last known place of residence of the defendant."

2. I say further that at that time the plaintiff knew full well that on account of ill-health I had left for Bloemfontein, in the neighbouring Republic.

3. That no demand has been made on me by the plaintiff, before issuing his summons, and I had no knowledge of the summons, nor of the judgment he had obtained on it, on the . . . . day of . . . ., until a few days ago, when I read in one of the city papers that judgment had been given against me by default.

4. I say further that I do not owe plaintiff any money. There has been a running account between us for some years past, which was finally liquidated in March last, by the plaintiff taking over my business of grocer in Cape Town, with such assets and outstanding accounts as there were, and the plaintiff allowed me the sum of £100 for the good will of the business.

Sworn at, &c.

Notice filing plaintiff's declaration for default of defendant's appearance.

(Heading.)

Sir, Take notice that we have this day filed, with the Registrar of this Honourable Court, for default of your appearance, the plaintiff's declaration or claim in the above cause, copy of which is hereunto annexed; and that you are hereby required to plead, answer, or except thereto, or make claim in reconvention (if any) within . . . . days after the service hereof: and that in default thereof you will be barred from pleading, answering or excepting thereto, and this cause will be set down for trial by reason of your default of appearance and plea, for . . . . the . . . . day of . . . .

Dated at Cape Town this . . . . day of . . . .

Yours, &c.

. . . . . .

Plaintiff's Attorney.

To

. . . . . .

The above-named Defendant.

Notice to set aside proceedings where the defaults have not been regular.

(Heading.)

Sir, Take notice that this Honourable Court will be moved on behalf of the above defendant, on the . . . . day of . . . . at 10 o'clock a.m., for an order to set aside all the proceedings taken by you from the issue of the summons in this case, on the ground of irregularity, in that there was short

service of the summons, and that your notice of filing the plaintiff's declaration is informal and insufficient.

And shew cause also why you shall not be ordered to pay the costs of this application.

Dated at C . . . . T . . . . this . . . . day of . . . .

Yours, &c.

. . . . . .

To Defendant's Attorneys.

. . . . . .

Plaintiff's Attorneys.

Affidavit in support.

(Heading.)

I, A.B. of . . . ., attorney for the above defendant, make oath and say :—

1. That from the return of the Sheriff, it appears that the summons in this case was served on the defendant on the . . . . day of . . . . at farm . . . . in the district of . . . .

2. That the defendant's farm is . . . . miles from the nearest railway station, which is . . . ., and that he is entitled to . . . . clear days in the summons, whereas he has been allowed only . . . . days.

3. That the plaintiff's declaration was on the . . . . day of . . . . filed for default of defendant's appearance, and the annexed notice of its filing was, with the copy declaration, served on the defendant, on the . . . . day of . . . . That the notice is informal, inasmuch as it does not call upon the defendant to plead, answer, or except to the declaration, or make claim in reconvention, &c., in terms of the . . . . Rule of Court.

Sworn at, &c.

Summons by a party who obtained provisional sentence, or judgment having the effect of a provisional sentence, at a Circuit Court, to have it declared final at a subsequent Circuit Court (see Rules of Court 179 & 189).

(Heading.)

Command A.B. of . . . . to appear before our Judge of the ensuing Circuit Court, for the district of . . . . to be holden on the . . . . day of . . . ., and then and there to answer C.D. of . . . ., and to shew cause why the provisional sentence granted by the Circuit Court for the division of . . . . on the . . . . day of . . . ., wherein the said C.D. was the plaintiff and the said A.B. was the defendant, on a (*here describe it, for instance*) promissory note for the sum of £ . . . . sterling, shall not be declared final ; and also to shew cause why the security "de restituendo" given by the said C.D. shall not be declared cancelled and annulled.

As it is said, &c.

Witness, &c.

Summons for a decree of reversal, or alteration, of a provisional sentence of the Circuit Court before it becomes final. (*Rules* 181–184).

(Heading.)

Command C.D. of . . . . to appear, &c. . . . . and then and there to answer A.B. of . . . ., and to shew cause why the sentence of the Circuit Court for the district of . . . . bearing date the . . . . day of . . . . in the case wherein the said C.D. was the plaintiff and the said A.B. was the defendant, in an action for (*here briefly state cause of action, for instance*) the recovery of the sum of £ . . . . sterling, shall not by judgment of this Honourable Court be reversed and altered on the ground (*here state the reasons why, for instance*) that the said A.B., the present plaintiff, was not duly served with the summons in that case. (*Or another reason, for instance;* that owing to the absence from the Colony of the said A.B., at the time of the service of the summons in the said case, at his last known place of residence, he did not become aware of the service of the summons, and the subsequent summons against him, until his return to the Colony, and that he does not owe the money, having on or about the . . . . day of . . . paid it to G.H. at the special instance and request of the said C.D.)

As it is said, &c.

CHAPTER XIII.

PERPETUAL SILENCE.

By the 25th and 330th Rules of Court, a plaintiff who has issued summons, but fails to proceed with his action within the time required, can have judgment signed against him by the defendant; but when a person in any manner gives out or spreads a report, or publicly pretends, he has an action against another, or makes a demand, but does not issue summons, the aggrieved party's only remedy is to sue him for "Perpetual Silence." The difference between the two processes is this, that while in the former the plaintiff can begin his action *de novo*, in the latter the party asserting a claim is perpetually barred from ever bringing an action. The object of an action for perpetual silence is to prevent any alleged claim or demand from remaining in uncertainty, from a defendant losing any testimony or evidence he may then have wherewith to rebut the allegations of the other party, which he might lose if the action were indefinitely delayed; also, in the case of his death, to give less chance or proof for his executors or heirs to dispute the other party's claim; and also, if he wishes to leave the country, though only on a visit, to prevent him being taken by surprise by an arrest for the pretended action.

We have no law in this Colony, as in England, by which proceedings may be taken to perpetuate the testimony of witnesses; though, when an action is once pending, and the testimony of a witness is in danger of being lost, he may be examined *de bene esse*.[1] Our only remedy, therefore, so

[1] See Chapter "*Commissions de bene esse.*"

long as a summons is not yet issued, is to sue for perpetual silence.

The course to be adopted is for the aggrieved party to summon the other to shew cause why he shall not be ordered and condemned to bring his pretended action to trial within six weeks thereafter, or stand for ever barred and have perpetual silence imposed on him, and he should moreover in the summons state briefly the nature of the action.[1]

The summons may be made returnable on any Court day.

No pleadings are filed in such a case, but, on the return day of the summons, counsel moves in terms thereof, supported by an affidavit of facts, a copy of which affidavit should be served on the defendant within a reasonable time before the hearing of the case. The application may, of course, be opposed on the return day of the summons, but it is for the Court to be satisfied that the plaintiff has sufficient grounds to have silence imposed on the defendant.

The Court may also fix any longer period than six weeks within which to bring the action or to stand barred.[2]

If a plaintiff repeats issuing summons *de novo* after each time judgment has been signed against him for not proceeding with the action within the time fixed by the Rules of Court, the Court may construe this into unworthy motives, and on the application of the defendant may order him to bring his action to trial by a certain day, or be for ever silenced.

Summons for perpetual silence.

(Heading.)

Command A.B. of . . . . (hereinafter called the defendant) that he appear before the Justices of our Supreme Court at Cape Town, on the . . . . day of . . . . at 10 o'clock in the forenoon, and then and there to answer C.D. of . . . . (hereinafter called the plaintiff) and to shew cause, if any, why he shall not by judgment of this Honourable Court be ordered and condemned to institute within six weeks after the return day of this summons, or within such other period as this Honourable Court shall be pleased to appoint, an action against the said plaintiff, which he, the said defendant, gives out or publicly pretends to have against the

[1] Merula, 4, 2, 22; Van Alphen, Vol. 1, Chap. 5; *Norden, Executor of Horn* vs. *Kilian and Stein*, and *Berg* vs. *Smuts*, 3 M., 550 and 583; *Campbell* vs. *Douglas*, 1 S., 48, and *Municipality of Worcester* vs. *Du Toit*, 2 J., 188.

[2] *Re West*, 1 R., 370.

said plaintiff (*here state the cause of the alleged action, for instance*) for recovery of the sum of £150 sterling, alleged by the said defendant to be due to him by the said plaintiff, for money lent and advanced to him, and which said alleged or pretended action the said defendant has hitherto failed and neglected to bring; and further also for the said defendant to shew cause, if any, why on his failure to bring his said alleged or pretended action within the time mentioned, he shall not have a decree of perpetual silence imposed upon him in respect thereof, and be for ever barred from bringing the same; and to shew cause, lastly, why he shall not be ordered to pay the costs of this application; as it is said, &c.

Witness, &c.

Affidavit in support of summons.

In the Supreme Court of the Colony of the Cape of Good Hope.

Between A.B., Plaintiff,
and C.D., Defendant.

I, A.B. of . . . ., the above plaintiff, make oath and say :—

1. That on or about the . . . . day of . . . . the said defendant stated to E.F. that he had a good action against me for the sum of £150, which he said he had lent to me in the previous year; that the said E.F. has since died, but before his death, meeting him and the said defendant together, I asked the latter whether it was true that he had said I owed him £150, to which he replied, "Yes, I did say so."

2. That on or about the . . . . day of . . . . I received a letter of demand from the said plaintiff, which is hereunto annexed, claiming the sum of £150, to which I replied, repudiating my liability, as per true copy of letter hereunto annexed, dated the . . . . day of . . . .

3. That from that date till now the said defendant has not commenced his alleged or pretended action, though requested to do so, as per true copy letter hereunto annexed, dated the . . . . day of . . . .

4. That owing to the defendant pretending to have an action against me and his not instituting it, I am left in uncertainty as to his object; and unless therefore he is compelled within a reasonable time to institute his action, I may be greatly inconvenienced by his delay, by the death or absence of any of my witnesses, or by the loss of documents or other causes, rendering disproof of the plaintiff's pretensions more difficult than now.

Sworn to at . . . .
this . . . . day of . . . .
Before me,
. . . . . A.B.
J.P.

(NOTE.—*The affidavit must of course contain the cause of action and the circumstances complained of; but may also contain other facts, which can serve to induce the Court to grant the application; for instance, such as that he (the plaintiff) is old and in ill-health, or intends leaving the country, or is hampered in his business and credit owing to the threatened action, &c.*)

CHAPTER XIV.

SUPERANNUATION.

IN the same way as prescription can be pleaded as a bar to certain actions, so can it be pleaded also as a bar to certain sentences of the Court. But the difference between "Prescription to an Action" and "Superannuation of a Sentence" is, that the former, when once duly completed, is a perpetual bar to the action, whereas the latter may, at any time within a third of a century, be revived in the same, or in a higher, Court. If not revived within that period, the right to do so becomes prescribed for ever, and the judgment cannot be executed.

In Holland, the sentences of town and village tribunals become superannuated after the lapse of a year and a day. In the higher Courts the period was at first five years, and afterwards extended to ten years, while the sentences of the Courts of Amsterdam and Middleburg never became superannuated.[1] As this privilege in regard to Amsterdam and Middleburg was purely local, it does not extend to the Colonies; the other, being general, does. The law of the Colony, therefore, was one year and a day in the inferior Courts, such as the Magistrates' Courts, and ten years in the higher Courts. But the Supreme Court, in 1830, in the case of *Meyer* vs. *Pohl*,[2] decided that the period for superannuation was and should be only one year; and this decree having been acted upon by the Court for more than a third of a century, became, by custom, the law of the land until it was altered as regards the higher Courts by the 370th Rule of Court.[3] By this Rule, "*no judgment becomes superannuated,*

[1] G.P.B., Vol. 2, p. 774, Art. 30; Merula, 4, 2, 23.
[2] 1 M., 498.
[3] *Bank of Africa* vs. *Kimberley Mining Board*, 2 A., 6.

or shall require to be revived, within six years from its date," and it is also retrospective.[1] But this Rule applies only to the Supreme, Eastern Districts', High Court of Griqualand West, and Circuit Courts,[2] and not to the Magistrates' Courts, the judgments of which, therefore, still become superannuated after the lapse of a year.[3]

When a sentence has become superannuated it can be revived only by a summons, not by a notice of motion, and the defendant must be called upon in the summons to shew cause why the sentence (giving the date and the amount of the judgment which has become superannuated) shall not be revived and execution decreed. No pleadings are filed in such a case, therefore, on the return day of the summons, which must be in the same form as a summons in a provisional case, and must be made returnable on a Court day. A motion is made in terms thereof, as in a provisional case, and an affidavit may be given in support of the fact that the judgment has become superannuated; and a copy of the judgment, with a copy of the taxed bill of costs incurred in obtaining the judgment, must be served with the summons.[4] But a Magistrate's Court judgment may, instead of by summons, be revived by notice of motion duly served on the defendant through the Magistrate's Court.[5]

A judgment which has become superannuated in a foreign country cannot be sued upon in this Colony until it has been revived in that country.[6]

If a judgment against a person, since deceased, becomes superannuated before his executors have received letters of administration, it should be revived against such executor.[7]

The object in requiring a revival of the sentence is to prevent a judgment-debtor being taken by surprise by the plaintiff suddenly enforcing execution. The rule was thus introduced for the benefit of a debtor, who, however, may either directly, or by his conduct, waive it.[8] There is no cause

[1] *Rabinowitz* vs. *Levenberg*, 4 J., 358.
[2] *Government Gazette* of 24th July, 1885.
[3] See also *De Beer* vs. *Rose*, 3 C. T., 45.
[4] Van Alphen, Vol. 1, Chap. 4.
[5] *De Beer* vs. *Rose*, 3 C. T., 45, and 10 J., 48.
[6] *Garlick* vs. *Broido*, 7 C. T., 159.
[7] *Buck* vs. *Barker*, 1 M., 82; Van der Linden, 3, 3, 4, and his Jud. Prac., Vol. 1, Bk. 2, Ch. 10.
[8] *Bank of Africa* vs. *Kimberley Mining Board*, *supra*.

that I can think of for which a defendant can successfully oppose the application for a revival of the sentence. He certainly has none of the defences which he might have had to the original action. His time for an appeal, or to have a judgment set aside when he has been in default, has by that time lapsed, and he is thus without any ground of defence, and must simply submit to the decree. This being so, the question arises, of what good or benefit is it to a defendant to sue him for a revival of a sentence, when its object (in not being taken by surprise by an execution) can just as well be gained by a letter to him?

The mere issuing of a writ of execution, and then withdrawing or withholding it, or only partially acting upon it, does not interrupt the operation of the rule of superannuation.[1] But if the writ be acted upon to its legitimate end, it does, as the rule then becomes inapplicable, and any number of *alias* writs can thereafter, at any intervals or distance of time, be issued without any revival of the sentence, and without any notice to the debtor.

Summons on a superannuated sentence.

(Heading.)

Command A.B. of . . . . that justly and without delay he render and pay to C.D. of . . . . the sum of £ . . . . sterling which he owes to and unjustly detains from him upon, and by virtue of, a certain sentence of the Supreme Court of our said Colony obtained by the said C.D. against the said A.B. on the . . . . day of . . . ., together with the sum of £ . . . . sterling, being the taxed costs and charges of the said C.D. in and about obtaining the said sentence, which said sentence has become superannuated. As it is said :—and unless he shall do so, then summon the said A.B. that he appear before our Justices of our Supreme Court of our said Colony, at Cape Town, on the . . . . day of . . . . at ten o'clock in the forenoon, to shew wherefore he hath not done it; and also to acknowledge or deny the validity of the said sentence, and also to shew cause, if any, why the said sentence shall not be revived and execution decreed thereon for the amount thereof and of the said costs.

And also summon the said A.B. then and there to plead to the provisional claim of the said C.D. for payment thereof, under security, with costs; and to join issue thereon. And serve on the said A.B. a copy of

[1] *Savings Bank* vs. *Maritz*, decided November, 1891, and the same *Bank* vs. *Botma*, decided December, 1891; neither of which is reported.

this summons, of the said sentence and of the taxed bill for the said costs whereon the said provisional claim is founded ; and return you then there this summons with whatsoever you have done thereupon.

Witness, &c.

Affidavit in support of the preceding summons.

(Heading.)

I, E.F. of . . . ., attorney for the above plaintiff, make oath and say :—

1. That on the . . . . day of . . . . this Honourable Court gave judgment for the plaintiff in the above cause for the sum of £ . . . ., a copy of which said judgment is hereunto annexed.

2. That the costs of the plaintiff in obtaining the said judgment amounted to £ . . . . as per taxed bill of costs hereunto annexed.

3. That no execution has been issued on the said judgment because the defendant has made frequent promises of payment and begged not to be put to further expense.

4. That the judgment and costs are still unsatisfied, and that owing to the said indulgence of the plaintiff to the defendant the said judgment has become superannuated, and it is necessary to have it revived for the purpose of taking out a writ of execution thereon.

Sworn, &c.

(Sd.) E.F.
Plaintiff's Attorney.

CHAPTER XV.

DE LUNATICO INQUIRENDO.

THIS is a judicial enquiry into the state of a person's capacity, either mental or physical, to take care of himself or of his property, or both, with a view of protecting him against injury or loss.

If the allegation is made that he is insane, it is for the Court to be satisfied that this is so. Medical evidence on the point will, of course, be very valuable, but it is not absolutely necessary. The evidence of non-professional witnesses may do as well. The Court must judge for itself from all the surrounding circumstances, either from evidence of witnesses or personal observation, whether or not the alleged lunatic be of unsound mind.

The presence in Court of the alleged lunatic is not absolutely necessary. There are many instances where the Court has insisted upon the presence of the lunatic, and has refused to go on with the enquiry until he was produced.[1] But in all such cases it has been where there was a doubt, or some conflicting evidence as to the insanity of the party. But where it was either inconvenient to produce the accused, owing to illness or great distance, or for whatever good cause, or where there was clear evidence of insanity, the Court has dispensed with the presence of the alleged lunatic.[2]

It is always better, however, to produce the lunatic when it can conveniently be done, as the Court has the right to insist upon it, and a personal observation of the lunatic's

[1] *Re Bathgate* in 1858, not reported.

[2] *Re Valentine* in 1864; and *Schwartz* in 1882; *Moorkel* in 1888; and *Van Niekerk* in 1888; none of which is reported.

appearance and conduct in Court often gives one a better idea of his state of mind than what can be gathered from witnesses.

As a rule, the witnesses in a lunacy case should be examined in Court, if possible; but the Court has sometimes directed their examination by Commission;[1] and in one case, that of *Valentine*, above mentioned, affidavits as to the insanity were directed to be filed, and the insanity was decreed on those affidavits. In the former case there was strong *primâ facie* evidence as to insanity of several years' standing, and in the latter case the man was at a very great distance from the Court, and was also too violent and dangerous to be brought to the Court.

Lunatics, or madmen, or insane persons, or idiots, as they are variously called, are sometimes very cunning when they know that the state of their mind is the subject of the enquiry, but the Court must judge whether their actions and conduct are according to the ordinary rules of society or the ordinary business of life; it must consider their manner and talk, the wildness of their looks, the incoherency of their language or expressions, irrational talk, delusions, and the like; in short any condition of intellect unfitting the person for the government of himself and his affairs.[2]

It sometimes happens that though a person is not so absolutely bereft of reason as not to be able to take care of his person, he may yet be unable to take care of his property, and in such a case the Court will appoint a curator to his property only; for instance, in the cases of the *Van Rensburgs*.[3] The Court appointed curators to their property only, as it was proved that, though in the possession of their mental faculties, they suffered from deafness and a certain degree of ignorance of business consequent thereon, and could not with safety be entrusted with the absolute management and disposal of their property. So also was a curator appointed to the property of *Rens* who, though capable of managing his person, was from deafness and dumbness

[1] *Re Van Niekerk*, 1888, not reported.

[2] As to the various kinds and degrees of insanity, see Dr. Taylor's "Medical Jurisprudence," Vol. 2, Chapters 88–98.

[3] 3 M., 99.

incapable of managing his affairs.[1] So also was a curator *bonis* appointed to manage the property of a deaf mute.[2] In another instance where the Court found that the person's brain was in a diseased state, and that he was squandering his property and purchased recklessly, he was declared to be a *prodigal*, for though he could take care of his person he could not of his property.[3] Similarly, in the case of *Hanbury*, in 1883,[4] the Supreme Court held him capable of taking care of his person, but not of his property, and appointed a curator to his property only.[5] So also have persons been declared prodigals and incapable of taking care of their property by reason of perpetual drunkenness, and have had curators appointed to their estates.[6] Since these decisions, Act 1 of 1897 has been passed, the 35th section of which confirms and more specially declares the law. By this Act persons alleged to be insane may under certain circumstances, stated in the Act, be detained without an Order of Court, but whoever is not confined, by virtue of this Act, must be treated under the common law, and whenever the Act is silent upon any point the same treatment must apply.

The preliminary step, extraneous of the Acts, to have a person declared insane or incapable of managing his affairs, is by way of petition to the Court for the appointment of a curator *ad litem* to the alleged lunatic. This petition should briefly set forth what interest the petitioner has in the application, such as, for instance, that he or she is husband or wife, or other near relative of the alleged lunatic, or a friend of such person who has no husband, wife, or near relative at or near the place where such person is residing;[7] also an allegation as to the insanity of the accused, and, if obtainable, then (though not absolutely necessary) a medical certificate. If there is not sufficient *primâ facie* evidence of insanity, the Court will not appoint a curator *ad litem*.[8] He may suggest in the petition, though not necessarily, as it may be men-

[1] 3 M., 100, and the same man years thereafter, F., 92; see also Grotius, 1, 11, §§ 1, 2.
[2] *Re Mostert*, 4 C. T., 399.
[3] *Re Filmer*, B. for 1875, p. 2.
[4] 2 J., 80.
[5] Consult also Grotius, 1, 11, § 4; and Van der Keessel, 165 and 166.
[6] *Re Chism*, 2 C. T., 5 and 16; *re Miller*, 9 J., 414.
[7] § 16 of Act 1 of 1897.
[8] *Re Honibal*, 4 C. T., 399.

tioned from the Bar, whom he may wish to be appointed curator *ad litem*, and conclude with a prayer for the appointment of such curator for the purpose of taking the necessary proceedings to have the alleged insanity established.

If this appointment is granted, a summons is to be served on the alleged lunatic and his curator *ad litem* to appear before the Court on a certain day, and to shew cause why he should not be adjudged to be of unsound mind and incapable of managing his affairs, and why a curator should not be appointed for the care of his person and for the care and administration of his estate.[1] This petition may also be made by any person interested in the property or funds in the custody or under the control of the lunatic;[2] and in case the person has no relative or friend, or there is no interested party able or willing to petition, the Master of the Supreme Court may *ex officio* do so.[3]

It is not necessary in this petition to produce evidence of insanity; it is sufficient if there is an allegation to that effect,[4] and that the Court is satisfied with that allegation.[5] It may also suggest the name of a curator *ad litem*, but other than the petitioner, for the petitioner will be the plaintiff in the case, and the curator is to assist the lunatic in his defence, if any.

The curator *ad litem* is entitled to be paid for visiting the alleged lunatic, with a view of satisfying himself as to whether or not the allegation of insanity is well founded. In the case of *Bathgate* (already quoted), the late Mr. Justice Watermeyer said:—

"The duty of the curator *ad litem* was to enquire. His duty was to make enquiries as to what is alleged with respect to the person to whom he is appointed curator, to see whether it is true or not true, and to endeavour to prove, in contradiction of what is alleged by the persons stating there is lunacy, that the alleged lunatic is sane. If he find he cannot do that, it is his duty to state that to the Court. At all events, there ought to be a thorough, searching investigation on the part of the curator, who is the guardian for the time being of the lunatic."

[1] *Ziedeman*, 1 M., 525.
[2] *Re Arthur*, decided 1891, not reported.
[3] Ordinance No. 105, § 11; see also *re Buxman*, 1 C. T., 146.
[4] *Re Schwartz*, 1882, not reported.
[5] Honibal, *supra*.

The duty of the curator *ad litem* ends with the proceedings to have the alleged lunatic declared insane.

The Attorney-General, the Solicitor-General, and the Crown Prosecutor of Griqualand West are respectively under the Act *ex officio* curators *ad litem* of such persons as have been arrested and detained in custody, on the ground of insanity, by an order from a magistrate.[1]

If it should be necessary to have the lunatic's property protected or taken care of before he can be judicially declared insane, the Master of the Court may appoint a curator *bonis* to take charge of the property;[2] but such a curator may, upon the petition of anyone interested in the lunatic or in his property, be appointed also by the Court pending the enquiry into the state of mind of the lunatic and the appointment of a permanent curator to his property.

Any Judge may now also, under certain circumstances, direct that proceedings shall be taken to have a person declared insane,[3] and in such a case the Registrar of the Court must issue the summons[4] against the lunatic and the official curator *ad litem* mentioned in section 13 of the Act, free of any stamp duty or office fee,[5] and it should be stated in such a summons that the alleged lunatic is detained by an order of a Judge.[6]

On the return day of the summons, for which day the witnesses are also to be subpœnaed to attend, the Court will enquire into the sanity of the alleged lunatic (no declaration or other pleadings are filed in such a case), and if he is found incapable of managing his person or his goods, he is declared insane and a curator is appointed to his person or goods, or both. The Court may, however, if necessary, appoint one curator to the person and another curator to the goods,[7] and in cases where the lunatic has property the Court may then also declare what amount shall be periodically paid to the Government for maintaining him.[8]

When a person stands indicted upon a criminal charge, or when there is any other criminal process against him, and

[1] § 13 of Act 1 of 1897.
[2] Ord. 105, § 14.
[3] § 15 of Act 1 of 1897.
[4] *Re Versveld*, 2 C. T., 159.
[5] § 15.
[6] *Wheelan* vs. *White*, 5 C. T., 226.
[7] *Re Kemp*, 2 M., 435.
[8] *Re Wheelan* vs. *White*, 6 C. T., 99.

it is given in evidence, on the trial of such person, that he was insane at the time the act was done, then if it appears to the jury (or to the Court, if there be no jury) that he was insane at the time he did the act, a special verdict or finding to that effect should be returned, and the accused is to be kept in custody as a criminal lunatic during the Governor's pleasure:[1] and so also if he was sane at the time he committed the act, but there is a doubt as to his sanity at the time of the trial, then, before the case against him can be proceeded with, a jury should be empannelled to try whether he is sane or not. This is very frequently done: in which case no curator *ad litem* is necessary. If the verdict of the jury should be that the accused is insane, and he has property to be taken care of, similar proceedings as in an action for insanity will have to be instituted, but only for the appointment of a curator to the property on proof of the verdict of the jury.[2]

When a minor becomes insane, he is not, during his minority, placed under curatorship but remains under the care of his father or guardian. If he has no guardian, the Court will appoint a curator.

Until the passing of Act 20 of 1879 (superseded by Act 35 of 1891), which in turn is now superseded by Act 1 of 1897, no person alleged to be a lunatic could be confined without an order of a Superior Court (though this was frequently, but illegally, done) except in cases of extreme necessity, when a disturbance of the public peace was reasonably apprehended and it was to the interest of the alleged lunatic, as well as for the safety of the public, that he should temporarily be placed under restraint by the order of the Magistrate or a Justice of the Peace till the proper tribunal could put him under curatorship.[3] But now a person who is a dangerous lunatic may be placed and kept under restraint by order of a magistrate, until he shall be lawfully discharged, or removed to some asylum by order of the Under Colonial Secretary; and any magistrate may, upon being satisfied on

[1] §§ 20, 21 and 22 of said Act.
[2] *Re Kaltenbach*, 3 M., 100.
[3] *Re Bathgate*, already mentioned; and also *Re Retief* in 1867, not reported.

oath or otherwise, that any person wandering at large is deemed to be a dangerous lunatic, order such person to be apprehended and brought before him and may also order him to be detained.[1] If, however, the alleged lunatic has property which requires to be taken care of, a Judge may appoint a curator *bonis* for the *temporary* care of the lunatic's property,[2] and afterwards a permanent curator must be appointed by the Court; but before the Court can grant such an appointment it must be satisfied that the party is insane, and for that purpose it must try the question of his sanity. Where the lunatic has no property, and he is confined by virtue of the Act, then it is unnecessary to have him judicially declared insane.

As long, however, as he is not declared insane by the Court, and he is confined by virtue of the Act, the Governor may, upon his recovering his sanity, release him from custody,[3] or he may be released by an order of a Judge.[4] This Act does not in any manner take away the power of the Court to have a person declared insane, whether there is property or not. On the contrary, it now specially confirms that power;[5] and the relatives or friends of an alleged lunatic who stands accused of a criminal offence often move the Court in the matter, in order to have him declared insane before he can be put on his trial.[6]

A person declared insane by the judgment of a civil tribunal may or may not be confined; this will depend on his violence or on his perfect harmlessness. If the former, he may be confined in the place or places usually set apart for that purpose; if the latter, the relatives or friends often offer to take care of him at home, or at some other convenient locality. But, unless the Court otherwise orders, the person in whose care the lunatic is must comply with the requirements of the Act. The Court must, however, be satisfied in whose custody or where the lunatic is to remain during the existence of the decree of insanity. In one instance—I forget the name, but it happened about 1865—the Court allowed

[1] §§ 4 to 18 of said Act.
[2] § 15, and *re Benade*, 8 C. T., 269.
[3] § 31.
[4] § 15, sub-section 4.
[5] § 43.
[6] *Re Breda*, in 1875, not reported.

the lunatic to be sent to his friends in England, because it was thought that a change of climate and a re-union with his relatives and friends would do him good. But without such an order the curator cannot send the lunatic out of the country and out of his control.

During his insanity the lunatic is maintained at his own expense, out of his own estate if he have any; and the degree of maintenance, or comfort, or luxuries to be allowed to him must depend upon his social position and his continued pecuniary means, coupled with his former usual and reasonable custom before insanity. But when a lunatic is confined in a Government asylum, he is subject to the regulations of that asylum, and his curator should pay the Government such amount as may be fixed by the Court.[1]

The costs of the proceeding to have a person declared insane, if successful, are also to be paid out of the estate of the lunatic; but, if unsuccessful, they are in the discretion of the Court, and sometimes the applicant has had to pay them.[2]

If at any time after the lunatic has been declared insane he should recover his reason, he may take steps in his own name and before the same or a higher tribunal to have himself declared sane again. This is done by his summoning his curator to shew cause why he should not be declared to be of sound mind again, and capable of taking care of his person and of managing his own affairs, and why he (the curator) should not be released from his curatorship and his appointment be recalled. Though the steps taken to have a lunatic declared of sound mind again have always been by summons, yet the Court has, in recent years, granted the order on petition, and has accepted affidavits in support thereof.[3]

On the return day of the summons (again no pleadings are filed) evidence must be given to satisfy the Court that the party is of sound mind again, and that he can take charge of his person and of his goods.

If, for whatever cause, the lunatic upon his recovery should

[1] *Wheelan* vs. *White, supra.*

[2] *Re Retief*, decided in 1867, not reported.

[3] *Re Borcherds*, B. for 1877, p. 72, and several subsequent cases.

not take proceedings to be freed from the order of insanity, and for the release of the curator from his curatorship, the curator may himself take proceedings for his discharge from the trust.

But the Court will not discharge the curator as long as he has not filed his accounts of administration.[1]

The office of curator to a lunatic, whether to his person or to his goods, is in many respects like that of a guardian who is to take care of his ward and of his property. The fundamental cause both of guardianship and of curatorship is "incapacity"; but the former applies to minority, the latter to one who has attained the age of majority, yet who on account either of mental or corporal incapacity or prodigality is unfit to take care of himself or to manage his own affairs. The former may be appointed by the parent, the latter by a Judge only.

A person to be a curator must be of the age of majority, and must himself be under no disability, nor under the power of another. By the Roman law a husband could not be a curator to his wife,[2] but he may be by our law to her person as well as to her goods.[3] A wife on the other hand cannot be a curator to her husband's person, nor can she be to his goods, if they are married *out* of community; but when they are married *in* community of property, she may, with another person, be co-curator to the joint estate on the ground of the interest she has in the joint estate by virtue of the marriage in community.[4]

A father may be a curator to his son's person and goods, and a son to the persons and goods of his father and mother; but a mother cannot be curator to her child. But without the question being mooted, and no doubt under the peculiar circumstances of the case, a widowed mother was appointed curator to the person of a son who was living with her and supported by her.[5] So also a sister-in-law who had charge of the lunatic's property and minor children was appointed by

[1] *Re Clydesdale*, 1 R., 258.
[2] C. 5, 34, 2.
[3] See also *re Anderson*, 4 C. T., 456.
[4] Grotius, 1, 11, 7; Van der Keessel, 168; and *re de Jager*, B. for 1876, p. 228. Consult also the "Burgerlyke Wetboek," Arts. 504–506, and Diephuis' Commentary on the Dutch Code, Vol. 2, tit. 18, § 1040.
[5] *Re Le Sueur*, 1892, not reported.

the Court, in 1895, as curator to the lunatic's property.[1] But these two appointments were owing to the fact that the mother in the one case, and the sister-in-law in the other, had already for a long time past the care and custody of the lunatic, and in addition, in the latter case, the management of the property, and under the peculiar circumstances of each case were thought to be the most suitable persons to be appointed.

One person may be curator of the person, and another of the estate, of the lunatic, if there are good reasons for making the appointments separately; for instance, if the lunatic is confined or resides at one place, and his property is situated elsewhere beyond the immediate personal control and supervision of the curator to the person; or, even if the lunatic is where his property is, one curator may be more able to take care of the person, while the other may be better qualified to look after the property.

Every curator to the property of the lunatic must, unless otherwise ordered by the Court, before entering on his administration, give security to the satisfaction of the Master of the Court for such amount as in the circumstances of each particular case shall be reasonable for the administration of the estate;[2] and on becoming insolvent his curatorship *ipso facto* ceases.[3] But the Court may, on appointing the curator, direct that he need not give security.[4]

When the Court has appointed a curator for the administration of the property of a lunatic, a copy of the order must be filed by the Master, who thereupon grants the curator a certificate that he has been so appointed, and the curator shall then be under the like duty and obligations as an executor to lodge with the Master an inventory of the property of the lunatic and accounts of his administration, and he shall be entitled to the same remuneration as an executor.[5]

Every curator to the property of a lunatic must within eight weeks from his entering on his appointment make an

[1] *Wheelan* vs. *White*, 5 C. T., 226.
[2] Ord. 105, § 16.
[3] § 17.
[4] § 34 of said Act.
[5] §§ 37–41 of said Act.

inventory of all the assets and effects of the lunatic, and transmit it to the Master[1]; failing which, he shall be liable to certain penalties.[2] If he makes a false inventory, he shall be liable to imprisonment with or without hard labour for any period not exceeding two years, or to fine, or to both.[3] He shall also pay to the Master all moneys of the estate as they come into his possession, except what may be required for the payment of debts and for the maintenance of the lunatic, failing which, without good excuse, he shall forfeit ten per cent. in favour of the lunatic of the money so retained;[4] but the Master shall repay to the curator such moneys as he may from time to time require for the benefit of the lunatic or his estate.[5]

A person under curatorship may, during a lucid interval and under certain precautions, make a will.[6]

A curator cannot dispose of the goods of the lunatic without an order of Court, except in case of necessity, and when there is no time to apply to the Court, in which case he may dispose of perishable articles. Hence the advisability of asking in the summons on the enquiry for this authority.[7] But in a case where a curator has *bonâ fide* and without leave of the Court sold landed property registered in the lunatic's name, the Court confirmed the sale on the ground that it was clearly for the benefit of the lunatic.[8] If, however, after the decree of insanity has been granted, the curator wishes for any special powers, he should apply for any of those allowed under section 42 of the Act.

A lunatic has a tacit hypothec upon the estate of his curator, which subsists for three years, or, in the case of absence from the Colony, for five years, from and after the day on which the lunatic ceases to be under curatorship.[9]

The curator must on the 15th Feb. of each year file an account with the Master,[10] but in addition to this the Court can order the curator to render accounts from time to time of

[1] § 18 of said Ordinance.
[2] § 19.
[3] § 20.
[4] § 25.
[5] § 31.
[6] *Re Kemp*, 2 M., 435; *Van der Spuy* vs. *Est. Domus*, 2 M., 420; Grotius, 2, 15, 4; and Res. of 29th May, 1731; Placaaten, Vol. 6, p. 636.
[7] Consult also § 24 of Ord. 105.
[8] *Re Calitz*, 3 C. T., 229.
[9] Act 5 of 1861, § 3.
[10] Ord. 105, § 38.

his administration, and may give him such further orders and instructions as to the management of the lunatic's person and estate as may under the circumstances of each case be necessary and tend to the interest of the lunatic; and, whether the lunatic has any property or not, the Court may order the curator to make periodical reports as to the lunatic's state of mind.

The accounts and reports are to be sent to, and filed with, the Master.[1]

If the curator neglects to file with the Master accounts of his administration, he forfeits all fees as curator.[2]

Upon the lunatic being declared of sound mind again, and capable of taking care of his person and property, he is entitled to an account from his curator as to his administration, and may sue him for that purpose if necessary; he may also bring an action if the curator shall have rendered copies of the accounts filed with the Master either incomplete, insufficient, false, or not substantiated by proper vouchers. On the other hand, the curator is entitled to be reimbursed all his necessary payments, and if he has not already paid himself out of the lunatic's estate, he may sue the lunatic for them.[3]

On the same principle the curator would be entitled also out of the lunatic's estate to a reasonable remuneration *for looking after*, or causing to be taken care of, *the lunatic's person* according to the degree of trouble or anxiety shown about his safety; but if the lunatic has no estate the curator must fulfil his trust as a labour of love.[4]

A criminal lunatic detained during the pleasure of the Crown, having during such detention committed another crime, is presumed to be still insane unless the Crown can prove his sanity at the time he committed the fresh offence.[5]

[1] *Re Valentine*, quoted above, and *re Kannemeyer*, in 1860, not reported, and now § 39 of said Act.

[2] *Oelofse* vs. *Griffiths*, 7 J., 182.

[3] See also now § 40 of said Act.

[4] See now also § 40 of the Act.

[5] *Regina* vs. *Isaacs*, 4 C. T., 459.

Petition for the appointment of a curator ad litem to an alleged lunatic.

To the Honourable the Judges of the Honourable . . . . Court of the Colony of the Cape of Good Hope.

The petition of A.B. of . . . .

Humbly sheweth :—

1. That she is married in community of property to C.D. of . . . . (*here put trade or profession*).

2. That of late her said husband has exhibited symptoms of mental imbecility, and he has in consequence been unable to attend to his affairs, in support of which she annexes hereto a certificate from Dr. . . . ., his medical attendant.

3. That it will be necessary and in the interest of the said C.D. and of his estate to have his sanity, or otherwise, duly enquired into and ascertained.

Wherefore your petitioner humbly prays that your Lordships may be pleased to appoint a curator *ad litem* to her said husband for the purpose of instituting an action to have him declared of unsound mind and incapable of managing his affairs.

And your petitioner as in duty bound will ever pray.

(*Affidavit of Verification.*)

Petition by a friend for a provisional curator bonis, and for a curator ad litem.

(Heading.)

The petition of A.B. of . . . .

Humbly sheweth :—

1. That your petitioner is an intimate friend of C.D. of . . . . who has no relations in this Colony, and that your petitioner is well acquainted with his family, who reside in Kent, in England.

2. That the said C.D. has a farm called . . . . situate in the district of . . . ., and that he has on the farm 5000 sheep, 50 horses, and a grocery shop, and a lot of other movables; and that there are also bills of his becoming due in the . . . . Bank at . . . .

3. That the said C.D. has for the last six months been very inattentive to his business, and has been in the habit of incurring unnecessary and injudicious expenses, whereby he has greatly diminished his property: and that for the last six weeks his habits have been filthy, and his language incoherent, and he will not on any account voluntarily leave his bedroom.

4. That your petitioner, who has an adjoining farm and who is in the habit of seeing the said C.D. almost daily, has frequently remonstrated with him about his conduct, with regard to his person and his property, but he did not seem to your petitioner to understand or to realize his position.

5. That your petitioner verily believes the said C.D. to be labouring

under some mental derangement, and that he is incapable of taking care of himself and of managing his affairs.

6. That in the interest of the said C.D.'s estate, it is necessary that a curator *bonis* be at once provisionally appointed to take charge of his farm, stock, and shop, &c., till the necessary proceedings can be taken to have him judicially declared insane, and a permanent curator be appointed to his person and to his goods.

7. That E.F. of . . . ., who is the chief overseer of the said C.D.'s farm, is a fit and proper person to be so appointed provisional curator *bonis* to take temporary charge of the estate of the said C.D., and that G.H. is a fit and proper person to be curator *ad litem*, to represent the said C.D. in the enquiry as to the state of his mind.

8. Wherefore your petitioner most humbly prays that your Lordships may be pleased :—

(*a*) To appoint the said E.F., as provisional curator or curator *bonis*, to take immediate charge of the property and estate of the said C.D., with power, if necessary, to continue to carry on the sale of the shop goods, and to pay such promissory notes, or bills, as are or may become due at the bank aforesaid, pending the enquiry, to be instituted as to the condition of mind of the said C.D. ; and

(*b*) That your Lordships may be pleased also to appoint G.H. to be curator *ad litem* to the said C.D. for the purpose of instituting proceedings against him to have him declared of unsound mind and incapable of managing his affairs.

And your petitioner as in duty bound will ever pray.

(*Affidavit of Verification.*)

Summons by the Master of the Supreme Court to have a person declared insane and for the appointment of a curator.

(Heading.)

Command A.B. of . . . . that justly and without delay he, by his curator *ad litem* C . . . . of . . . ., appear before the Justices of the Supreme Court of our said Colony at Cape Town on the . . . . day of . . . . at 10 o'clock in the forenoon to shew cause, if any, to E.F. in his capacity as Master of the Supreme Court, why the said A.B. shall not by judgment of the said Court be found and adjudged to be insane and incapable of managing his affairs, and why a curator or curators shall not be appointed for the care of his person and the administration of his estate, and to do all such acts for, and on behalf of, the said A.B. as may be necessary for the management of his estate ; as it is said : and serve on the said A.B. and the said C.D. each a copy of this summons : and return you then there this summons with whatsoever you have done thereupon.

Witness, &c.

Summons by a wife to have her husband declared insane; for the appointment of a curator; with power to sell movables for maintenance and education of the family.

(Heading.)

Command A.B. of . . . . that justly and without delay he, by his curator *ad litem* C.D., appear before our Justices of our Supreme Court of our said Colony at Cape Town on Tuesday the . . . . day of . . . . at 10 o'clock in the forenoon, and then and there to answer E.F. wife of the said A.B., and to shew cause, if any :—

1st. Why the said A.B. shall not by judgment of the said Court be found and adjudged to be insane and incapable of taking care of his person and of managing his affairs ; and why a curator, or curators, shall not be appointed for the care of his person and the administration of his estate, and to do all such acts on behalf of the said A.B. as may be necessary for the management of his estate ; and

2nd. Why the curator to the goods, to be appointed as aforesaid, shall not have power to sell, if necessary, all the movable property of the said A.B. for the purpose of the maintenance of himself and his wife, and for the maintenance and education of his minor children : as it is said : and serve on the said A.B. and C.D. each a copy of this summons ; and return you then there this summons, immediately after the service thereof, with whatsoever you have done thereupon.

Petition by a curator of the goods of the lunatic to sell landed property.

(Heading.)

The petition of A.B. of . . . .

Humbly sheweth :—

1. That on the . . . . day of . . . . C.D. of . . . . was by this Honourable Court declared insane and incapable of administering his affairs, and your petitioner was appointed curator to his person and to his goods, with power to sell the movables, if necessary.

2. That on your petitioner assuming the management of the lunatic's affairs, he found a large number of debts due by him, and was threatened with actions, whereupon your petitioner sold such of the movable property as was not required to work the farm "Kalabas" situated in the district of . . . ., which realized the sum of £ . . . . ; and of which an account has been rendered to the Master, with all the payments made up till then.

3. That your petitioner has diligently cultivated the said farm, and rendered an account to the Master of all the income and expenditure thereof, shewing a balance profit of £ . . . . ; and that out of this sum your petitioner has paid the interest on the bond on the farm, and also paid other debts of the said C.D., amounting together to £ . . . . as will appear from the said last-named account.

4. That the mortgage bond on the farm is for the sum of £ . . . . in favour of E.F. of . . . ., which is at present nearly the full value of the farm, and which bond has now been called up by the said mortgagee.

5. That your petitioner has endeavoured to induce other parties to

take over the said bond but failed, and that he sees no chance of raising a fresh loan on the farm for the amount of the bond. That there is no other landed property belonging to the said C.D., and the movables belonging to him consist of farming implements, eight mules, one wagon, two horses and one cart, worth together about £150.

6. That under these circumstances it will be to the interest of the said C.D. to have the farm sold: the farming implements will then have to be sold also, as they will be of no further use: but there will be no necessity at present to sell the mules, horses, wagons and cart, as an offer has been made by the Government to hire them, for one year, to carry materials and for use in the construction of the . . . . Pass.

Wherefore your petitioner humbly prays that your Lordships may be pleased to allow him to sell the said farm, either by holding a public auction or by private sale, as may seem most to the interest of the said C.D., and to authorise him also to give transfers thereof to the purchaser.

And your petitioner, &c.

(*Affidavit of Verification.*)

Summons to shew cause why a person shall not now be decreed to be of sound mind again, and for the discharge of the curator.

(Heading.)

Command A.B. of . . . . appointed by the decree of the Honourable Supreme Court bearing date the . . . . day of . . . . curator of the person of C.D. of . . . ., and E.F. of . . . . appointed by the said decree curator of the estate of the said C.D., that they appear before our Justices of the Supreme Court of our said Colony at Cape Town on the . . . . day of . . . . at 10 o'clock in the forenoon, then and there to answer the said C.D. and to shew cause why the said C.D., who was found and adjudged to be of unsound mind and incapable of managing his estate and affairs, shall not, by judgment of this Honourable Court, be found and adjudged to be now of sound mind again and capable of managing his affairs: and why the curatorships over the person and the estate as aforesaid of the said A.B. and E.F. shall not cease and determine: as it is said: and serve on the said A.B. and E.F. each a copy of this summons, and return you then there this summons with whatsoever you have done thereupon.

Witness, &c.

(*Instead of this summons to be declared of sound mind again, the proceedings may now also be by petition.*)

(Heading.)

The petition of A.B. of . . . .

Humbly sheweth :—

1. That on the . . . . day of . . . . your Honourable Court declared your petitioner to be of unsound mind, and appointed C. . . . . to be the curator of his person, and D. . . . . to be the curator of his goods.

2. That your petitioner has entirely recovered and is of sound mind again, and is desirous of being re-invested with the administration of his affairs.

Wherefore he humbly prays that your lordships may be pleased to declare him of sound mind again, to rescind the order declaring him insane, and to discharge the curators from their trust.

And your petitioner, &c.

(*Affidavit of Verification.*)

NOTE.—*Notice of this petition and of the day of moving the Court must be given to the curators, and evidence of sanity must be produced.*

Summons by a curator to be released from his trust by reason of the recovery of the lunatic.

(Heading.)

Command A.B. of . . . . that he appear before our Supreme Court of our said Colony at Cape Town on the . . . . day of . . . . at 10 o'clock in the forenoon to answer C.D. of . . . ., his curator, and to shew cause why the Order of the . . . . day of . . . . appointing him curator to the person and goods of the said A.B. shall not be recalled and he be released from the curatorship on the ground that the said A.B. is of sound mind again, and capable of taking care of his person and property, and that he the said C.D. has made a full and complete administration of the affairs of the said A.B., and has filed his accounts, supported by vouchers, with the Master of this Honourable Court: as it is said: and serve on the said A.B. a copy of this summons, and return you this summons immediately after service thereof with whatsoever you have done thereupon.

Witness, &c.

Summons by a lunatic, after he is declared sound again, against his curator for an account of his administration and to debate the accounts.

(Heading.)

. . . . in an action wherein the plaintiff claims from the defendant a full and true account, supported by proper vouchers, of the whole of his administration of the property and effects of the said plaintiff, during the time that he (the defendant) was the curator to his (the plaintiff's) goods: also to debate such account and to debate also the accounts already filed by him as curator with the Master.

As it is said, &c.

CHAPTER XVI.

CONTEMPT OF COURT.

It is not my intention to go into this subject further than is necessary for practical purposes. In the Chapter on "*Civil Imprisonment*," I pointed out that where a person has been condemned *ad præstandum factum*, he may either be civilly imprisoned for not obeying the order of Court, or be committed for contempt of Court and thus be criminally confined.

At the present day, in such cases we always take the proceedings for contempt of Court, because it is more expeditious, and it is also less expensive to the plaintiff, as he has not then to maintain the defendant in gaol; it is also more effectual as regards the latter, because criminal; and moreover the Court has an interest and a duty to see its orders obeyed.

Contempt of Court may, generally speaking, be said to consist of two kinds:—

1. Contempt in the presence of the Court.
2. Contempt outside the precincts of the Court.

1. *In the presence of the Court*, as for example: not obeying an order of Court, given to a person in Court to be then and there obeyed, or carried out; remaining in Court after an Order to withdraw; refusing, without a lawful cause, to give evidence or to answer questions put;[1] openly insulting the Court; grossly insulting the Court; coming drunk into the witness-box. Any insolvent refusing to answer before a

[1] *Re Mrs. Garcia*, who, for refusing to answer a question which the Court held a very proper one, was committed to gaol till she could answer the question, and who, after a few days, on answering the question was released from imprisonment: decided in 1872—not reported.

Magistrate or a Commissioner in Insolvency, or before the Master of the Supreme Court, in any matter concerning his insolvency, may be committed to gaol till he does answer the question.[1] So also where an agent of the Magistrate's Court removed from the table of the Court, while a case was going on, money he had tendered to the Clerk of the Court, and when the Magistrate ordered him not to remove it, refused to restore the money, the Magistrate fined him £5 for contempt of Court, which sentence was confirmed by the Supreme Court.[2] But a Magistrate has no power to sentence for Contempt of Court a prisoner undergoing a trial on a substantive charge,[3] and a Special Justice of the Peace has no power whatever to fine for contempt of Court.[4]

2. *Outside the precincts of the Court*, as for example: disobeying a subpœna;[5] arresting or detaining a witness, or enticing him from attending, so as to prevent his giving evidence;[6] commenting in the public papers on a pending trial, and thereby exciting a prejudice against the parties, or their litigation;[7] addressing a contemptuous letter to a Judge, reflecting upon, or tending to interfere with, the administration of justice in his Court; using scandalous or contemptuous words against the Court, or the proceedings thereof; assaulting, or using violence or abusive language to, a person serving the process or order of the Court;[8] preventing or attempting to prevent an officer from serving a process of the Court; libelling, or slandering the Court, or a Judge in his judicial capacity; refusing to do any act, or to execute any deed, which a party has been ordered to do by the Court;[9] doing any act or deed which a party has been ordered to abstain from doing; and generally by *saying or doing* anything tending to create a disregard of the authority of a Judge, or to bring the administration of justice into contempt.[10]

[1] §§ 65 and 68 of Insol. Ord.
[2] *Re Honeyborne*, B. for 1876, p. 145.
[3] *Queen* vs. *Schwartz*, B. for 1868, p. 13.
[4] *Queen* vs. *Visagie*, 9 J., 503.
[5] See Chapter "*Subpœnas*."
[6] *Queen* vs. *Foye and Cohen*, 2 A., 121.
[7] *Tichborne* vs. *Tichborne*, 39 L. J. Ch., 398.
[8] See also *Price* vs. *Hutchinson*, 9 L. R. Eq., 534.
[9] *Twentyman and another* vs. *Hewitt*, 1 M., 156, and *Manuel's Trustees* vs. *Norden*, 3 M., 526.
[10] See also *Reg.* vs. *Gray*, 82 L. T., 534, decided in 1900.

Then again there are many instances where Executors and Trustees have been ordered to file accounts of their administration, and, failing to do so, have been committed to prison for contempt.[1] Jurymen are constantly fined for non-appearance when called; witnesses duly subpœnaed are also fined for non-appearance.[2]

In the case of the *Queen* vs. *Foye and Cohen*,[3] the defendants were indicted and convicted for interfering with the due administration of justice by enticing and removing away witnesses so as to prevent their giving evidence.

In the case of *Neethling*,[4] the defendant had written a letter to a newspaper, in which he used the words in reference to one of the judges that he had "in a spirit of humour and abandon given unrestrained licence to his tongue;" these words were held contemptuous, and constituted a contempt of Court. But as Mr. Neethling suitably apologised, no punishment was inflicted on him.

When a party, who was ordered to give transfer of certain specified property, gave transfer materially different from that ordered by the Court, it was held a contempt of Court.[5] So also when a person was ordered to give transfer, but failed to do so, it was held a contempt of Court for which he could be imprisoned till he complied with the order of Court, but under the peculiar circumstances of his state of mind, though he was not insane but eccentric, the Court ordered the transfer to be passed by the Sheriff.[6] So also a letter published in a newspaper, accusing the Court of combining to prevent fair play to prisoners, was held a contempt of Court, and the defendant was fined £50 and imprisoned for a month.[7] So also a husband, who was ordered to pay alimony to his wife and failed to do so, was declared in contempt, with an intimation that, if he did not pay the money by a certain day, he would be imprisoned.[8]

[1] See also *Est. Maskell*, B. for 1873, p. 28; and, by analogy, *Taute* vs. *Executors of Rensburg*, B. for 1876, p. 15; and *Kemp* vs. *Kemp's Trustees*, decided in 1874, not reported; *Master* vs. *Cloete*, and *Master* vs. *Geldenhuys*, 7 C. T., 494.

[2] See Chapter "*Subpœnas*."

[3] 2 A., 121.

[4] B. for 1874, p. 133.

[5] *Executors Smith* vs. *Galpin*, 1 R., 62.

[6] *Van der Byl* vs. *Hanbury*, 2 J., 80.

[7] *Re Blanche*, 1 J., 83.

[8] *Slade* vs. *Slade*, 4 E.D.C., 243.

A trustee of an insolvent estate may also be committed for contempt of Court, in case of disobedience to any order of Court, made under the 113th and 115th sections of the Insolvent Ordinance, until he shall obey such order.

But, in order to commit a person for contempt of Court for disobeying, or refusing to carry out, a judgment or written order of Court, there *must be proof of that person's knowledge of such order.*[1]

The Court is generally unwilling to grant an order for contempt for disobeying on order of Court, unless there is wilful disobedience, but the degree of "wilfulness" must depend upon the party committing the offence, whether he is an officer of the Court or otherwise; and whether he is an intelligent or an ignorant person. But a mere mistake, or a *bonâ fide* misunderstanding of the order of Court, will not be regarded as a contempt; and *the question whether a contempt has or has not been committed* is for the decision of the *Court itself.*[2]

A contempt of Court committed in the presence of the Court can be summarily dealt with, then and there, without any written charge, or notice to the offender; and a writ for personal attachment, or for the fine, can also forthwith be issued by the Court.

All those who receive their orders *in* Court but fail to execute them, or who do an act of contempt *in* Court, as also a juryman, or a witness, not answering to his name when duly called, are considered to have committed their contempt *in facie curiæ:* but for any act of commission or omission, *outside* the precincts of the Court, amounting to a contempt of Court, if the proceedings are instituted at the instance of the Court, or the public prosecutor, or a private party, the specific offence charged against the accused is to be distinctly stated. In the case of *Neethling*, hereinbefore mentioned, the Court followed the proceeding adopted in the Tichborne trial. Proceedings by a private party may be by summons, but are now-a-days generally by notice of motion setting forth distinctly the grounds of complaint.

The Court has the discretion to punish the offender in any

[1] *Botha* vs. *Dreyer*, 1 E.D.C., 74. [2] See also *re Crawford*, 13 Q. B., 613.

manner it pleases, according to the magnitude or triviality of his offence; and to do so either civilly or criminally; and either by fine, or imprisonment, or both; and conditionally or unconditionally.[1] But a Magistrate cannot pass a heavier, or any other, sentence for contempt of Court than a fine not exceeding £5, and in default of payment, of imprisonment for any period not exceeding seven days.[2] The form of the writ for contempt of any Court higher than a Magistrate's Court, whether for the fine or for the personal attachment, is given in the 219th Rule of Court.

As a rule the Court, whose order has been disobeyed, should adjudicate upon the question of contempt, and the person who wrote or said anything against a judge amounting to contempt can be punished by that judge in his Court; there is nothing, however, to prevent a case for contempt being brought before a higher tribunal, especially when it is a contempt against a judge.[3]

The following is the form of the order served in the Neethling case, at the instance of the Attorney-General.

In the Supreme Court of the Colony of the Cape of Good Hope.
Cape Town, Friday the 4th day of December, 1874.

The Queen
against
The Honourable M.L.N.
Member of the Legislative Council, respondent.

Upon the motion of Her Majesty's Attorney-General for this Colony and upon reading the affidavit of P.N., editor of . . . . newspaper, sworn this day, and the documents annexed thereto.

It is ordered that the above-named M.L.N. do attend this Honourable Court on Thursday the 8th day of this present month of December, at 10 o'clock in the forenoon, peremptorily to answer for a certain contempt of Court, committed by him, in having written and caused to be published, in the . . . . newspaper of the 3rd instant, a certain letter signed by him the said M.L.N. dated at . . . . the . . . . day of . . . . ; and to shew cause, if any, why he should not be punished and dealt with as this Honourable Court shall think fit, for the contempt aforesaid.

By order of the Court,

. . . . . .

Registrar of the Supreme Court.

[1] See *Reg.* vs. *Gray*, *supra*.
[2] § 54 Magistrates' Courts Act.
[3] *Reg.* vs. *Gray*, quoted above.

Notice at the instance of a private party, to be served on a person to answer for contempt of Court for refusing to file an account.

In the Supreme Court, &c. :—

Between A.B.
Applicant.
and C.D.
Respondent.

Sir,—Take notice that application will be made to this Honourable Court on behalf of the applicant on . . . . the . . . . day of . . . . at 10 o'clock in the forenoon, at which time you will be required to shew cause, if any, why an order for personal attachment shall not be granted against you for your contempt of Court, committed by you in failing to file an account of your administration and proposed distribution of the estate, of the late E.F., of which you are the executor, and which on the . . . . day of . . . . you were ordered by this Honourable Court to do on or before the . . . . day of . . . . last past; and further, to shew cause why you shall not also be ordered to pay the costs of this application.

Cape Town, this . . . . day of . . . .

Yours, &c.

. . . . . .
Applicant's Attorneys.

To C.D. of . . . .
The above Respondent.

Affidavit in support.

(Heading.)

I, ... of Cape Town, attorney for the above applicant, make oath and say :—

1. That C.C. of . . . . the above respondent is the executor testamentary of the estate of the late E.F. of . . . . and received letters of administration of said estate on the . . . . day of . . . .

2. That on the . . . . day of . . . . the said applicant obtained an order from this Honourable Court, ordering the said respondent to file with the Master of this Honourable Court, on or before the . . . . day of . . . . last past, an account of his administration and proposed distribution of said estate.

3. That a copy of said order was duly served on the said respondent personally, on the . . . . day of . . . (as appears from the affidavit with copy of order annexed herewith); but, up to this moment, he has not complied with it.

4. That the only course now open to the said applicant is to move this Honourable Court for a writ of personal attachment against the said respondent, and that he be punished and dealt with by this Honourable Court, as it shall seem fitting, for his contempt aforesaid.

Sworn at Cape Town, this . . . . day of . . . . &c.

(*Make affidavit of service of the notice on respondent and of foregoing affidavit.*)

Notice for contempt for not carrying out the terms of an award.

(Heading.)

Gentlemen,—Take notice that application will be made to this Honourable Court, on behalf of the above applicant, on . . . . the . . . . day of . . . . at 10 o'clock in the forenoon, or so soon thereafter as counsel can be heard, at which time you will be required to shew cause, if any, why an order for personal attachment shall not be granted and issued against each of you for your contempt of Court, committed by you in your failing and refusing to comply with the terms of a certain award bearing date the . . . . day of . . . . between the said applicant and you the said respondents, and with the terms of a certain judgment bearing date the . . . . day of . . . . making the said award a rule or order of this Honourable Court, and by which said award and judgment you, as co-proprietors with applicant, were, among other things, ordered and condemned to join and to give to the applicant divisional transfer by diagram of his share of the farms "G . . . ." "P . . . ." and "O . . . .," situate in the district of . . . .; but which you have failed to do, though the necessary diagrams for that purpose have been framed, examined, deducted and certified correct, and all the necessary documents are ready for your signatures to complete the said divisional transfer; and further, why you jointly and severally shall not also be ordered to pay the costs of this application.

Cape Town . . . . day of . . . .

Yours, &c.

. . . . . .

Applicant's Attorney.

To C.D. & E.F.
The above Respondents.

Affidavit in support.

I, ... of . . . . the above applicant, make oath and say :—

1. That I am co-proprietor of, and hold in undivided shares with the respondents, one-fifth of the farms "G . . . ." "P . . . ." and "O . . . ." situate in the district of . . . .

2. That as the respondents would not voluntarily join me in a partition of the said farms, so as to give to each owner his defined share therein, I was obliged to take legal proceedings to compel them to a division of the farms; and accordingly instituted an action against them, and on the . . . . day of . . . ., this Honourable Court appointed Mr. . . . . of . . . . as arbitrator to divide the said farms equally between the respondents and myself.

3. That Mr. . . . . duly convened a meeting of us all, and heard what each party had to advance, and on the . . . . day of . . . . made his award.

4. That this award was, after due notice to the respondents, on the . . . . day of . . . . made a rule or order of this Honourable Court; and

a copy of this rule or order, embracing the said award, was duly served on each of the said respondents personally.

5. That the diagrams necessary to effect divisional transfer, in terms of the said award, have been duly framed by the surveyor X . . . . at the request of the arbitrator, and have been examined, deducted, and certified correct by the examiner and the deductor of diagrams ; and the necessary documents to effect divisional transfer have all been prepared, and are ready for the signatures of the said respondents ; but the said respondents, though requested thereto, have failed, neglected and refused to join in passing divisional transfer of the said farms, so as to carry out the said award and said order of Court.

Sworn at . . . . this . . . . day of . . . .
&c.

(*Annex affidavit of service of notice and affidavit.*)

CHAPTER XVII.

IN FORMÂ PAUPERIS, OR PRO DEO.

THESE terms are alternately used, but most frequently the former in writing and the latter in speaking. It is a privilege granted by the Court to sue or defend, *gratis*, given to those who have a good right of action in law but no means to assert it. Any poor person, who has not the means of going to law, may petition the Court for leave to sue, or defend, *in formâ pauperis*. The benefit is that the petitioner, whether he wins or loses his case, pays no costs, unless he comes into funds by the result of the action or from any other source pending the result of the action. In the case of *Schneegans* vs. *Schneegans*[1] the Chief Justice said :—

"The main object, in bringing an action *in formâ pauperis*, is to enable the plaintiff to recover costs, if successful; and, if unsuccessful, to prevent him being saddled with defendant's costs."

To obtain this privilege the party must petition the Court, setting forth, briefly, the cause of action, and that he is not possessed of property to the amount of £10 in value (excepting household goods, wearing apparel, tools of trade), and the matter, or thing, claimed by him in the suit; and concluding with a prayer for leave to sue *in formâ pauperis*;[2] and that an advocate and an attorney may be appointed for that purpose to act for him in their respective professional capacities.[3] The word "possessed," mentioned in the 125th Rule, is taken to mean that applicant should not "own" sufficient property.[4] This petition must be verified by

[1] B., 1876, p. 9.
[2] Rule 125.
[3] Rule 126.
[4] *Behrens* vs. *Berg*, B. for 1877, p. 138.

affidavit, and must be supported by an affidavit from two householders, living in his neighbourhood, to the effect that they know the petitioner and that he is not possessed of property to the amount of £10 in value, save household goods, &c.[1] Where the petitioner has not been able to get the affidavit of two householders, either because they will not, or cannot, swear to it, or because he is not known to others, the Court, upon being satisfied of these facts, has accepted the affidavit of any two other parties who could swear to the poverty of the petitioner. The attorney who acts for the petitioner should satisfy himself that the petitioner is really a pauper before moving in the matter.[2]

Of late years the practice of the Court is to refuse leave to sue as a pauper *in divorce cases*, unless the applicant appears in person:[3] and in the case of *Epstein* vs. *Epstein*[4] the Chief Justice said:—

"The Court had laid down that when leave to sue *in formâ pauperis* was given it must be a clear case of distress, and the applicant (who sues for divorce) must be a person who had no means and could not earn any."

The petition is set down on the Roll in the usual way, and either a motion is made from the Bar to refer or, if no advocate appear, the Court refers, the petition to an advocate for his certificate as to *probabilis causa*. But when it is self evident on the face of the petition that there is no cause of action or defence, the matter is not referred to Counsel.[5] Usually this reference is to the barrister who moves, but, if no one moves, the Court requests a barrister to take the reference. This reference does not necessarily oblige him to go into all the evidence of both parties, but counsel must satisfy himself from the *ex parte* statement of the petitioner with such confirmatory evidence as the latter can conveniently produce, and with such evidence as the opposite party may voluntarily put before him, that the petitioner has, *primâ facie*, a good cause for the action or for the defence.[6] If the certificate is adverse to the petitioner,

[1] Rule 125.
[2] *Chambers* vs. *Chambers*, 3 C. T., 277.
[3] *Bacela* vs. *Bacela*, 8 C. T., 98.
[4] Decided 1902, not reported.
[5] *Re du Plooy*, 10 J., 7.
[6] *Melckman* vs. *Currey*, 2 R., 19; *Ormond* vs. *Jordan*, 4 E.D.C., 260; *Goliath* vs. *Keating*, 7 J., 52.

the leave to sue or defend, as a pauper, is not granted; if favourable, then the certificate is put on the Roll for a *rule nisi.*

Sometimes, to save time, the barrister who moves in the matter intimates to the Court that, before presenting the petition, he has considered the case and satisfied himself of the *bona fides* of the action or defence, and that he is prepared to certify at once that he believes the party has a good cause. The Court will accept this certificate, which is then treated in the same way as if there had been a formal reference. Counsel then moves that a *rule nisi* may be granted, calling upon the defendant to shew cause why petitioner shall not be allowed to sue, or defend, *in formâ pauperis.* This Rule is served on the defendant, or opposite party, and a day is therein named for him to shew cause to the contrary. He (the defendant) cannot go into the merits of the defence, especially as to facts, but will be allowed to disprove the allegations of the alleged poverty, or give such other reasons, satisfactory to the Court, why the privilege to sue, or defend, as a pauper, should not be granted to the petitioner: for instance, that the petitioner's claim at law is manifestly groundless:[1] or where it is made clear to the Court that there is no cause of action or defence.[2] A man who is in the receipt of good wages is not entitled to sue as a pauper.[3] And a man, though not actually in the possession of £10, yet, if he has the means of obtaining the money, as, for instance, where he has a vested interest in certain property, which he can dispose of for more than £10, is not entitled to litigate *pro Deo.*[4] If on the return day of the Rule no cause be shewn to the contrary, or not sufficient cause, then it is made absolute, from which moment the party is said to sue, or defend, as a pauper. If the Court should hold that applicant is not a pauper, and that he has no cause on the merits, he has to pay the costs incurred by the respondent in bringing

[1] V. d. Linden, 3, 2, 5, and his Jud. Prac., 1, 8, 10; and *Melckman* vs. *Currey*, 2 R., 19.

[2] *Re Du Plooy*, 3 C. T. 11, and 10 J., 7.

[3] *Schneegans* vs. *Schneegans*, B. for 1876, p. 9.

[4] *Behrens* vs. *Berg*, B. for 1877, p. 138; and *Shakofsco* vs. *Van Noorden*, 1 C. T., 121.

these facts to the knowledge of the barrister who has to certify, or to the Court.[1]

The privilege is given to a defendant as well as to a plaintiff, and either party becoming poor during the progress of a suit can ask for leave to sue, or defend, the rest of the action as a pauper: either party becoming, during the progress of his cause, able to pay his costs, or misbehaving himself therein by any vexatious or improper conduct or proceeding, or wilfully delaying the cause, can be deprived of the privilege of a pauper suitor.[2]

A person who has received permission from the Supreme Court to sue as a pauper may, in the absence of an order of the Court to the contrary, commence his action in the Circuit Court without special permission of either Court.[3]

Advocates, or attorneys, are to take no fee from any person admitted to sue, or defend, as a pauper, but if the pauper is awarded his costs to be paid by his opponent, they are entitled to the usual fees and costs on taxation.[4]

In a *Pro Deo* case, where the Court has ordered the amount of the judgment to be paid to the Master, in trust for a minor, it is in the discretion of the Court, where the costs of the action have not been recovered from the defendant, to order the plaintiff's costs to come out of such fund, or to refuse the application.[5]

Where a man has been ordered to pay costs in the Court below, he cannot appeal to, or sue, in a higher Court as a pauper, without first paying these costs;[6] or give security for the costs of appeal.[7]

The 123rd, 124th, 128th, and 129th Rules of Court, relating to the Poor Fund, are practically useless, as there is no such fund and no provision made for creating one. The result therefore is that, though a person obtains leave to sue, or defend, as a pauper, he really escapes only from paying the Court fees and stamps and the advocate's and the attorney's fees. All other expenses he must pay for, unless

[1] *Goliath* vs. *Keating*, 7 J., 52.
[2] Rule 130.
[3] *Philips* vs. *Hanau and Hoffa*, decided in 1870, not reported.
[4] Rule 127.
[5] *Matthys* vs. *Hart*, B. for 1876, p. 39.
[6] *Goldman* vs. *Glass*, 5 J., 76.
[7] *Hulpert* vs. *Castle Mail Packets Co.*, 6 J., 26.

he is fortunate enough to get them foregone by the different parties; for instance, the Deputy Sheriff's charge for serving the summons; the agent's charge for serving subpœnas or notices; the witnesses' expenses for their attendance; advertising in the newspapers in the case of edictal proceedings; and even such trivial matters as the postages and stationery. Frequently these extras cause heavy items, and the party must simply abandon the idea of an action. I was informed by the late Mr. Justice Fitzpatrick that, while he was Recorder at King William's Town before its annexation to this Colony, there was a "Poor Fund" for pauper suits, created by fines and certain fees of each case tried in his Court; and that on the annexation, the balance of the fund, which then amounted to 1*s.* 9*d.*, was transmitted to the Cape Town Treasury. Can we, politically, now call this a "sinking fund," if I may be permitted to make what may almost amount to a *poor* joke?

Petition to sue in formâ pauperis.

To the Honourable the Judges
of the Honourable the Supreme Court of the Colony of the Cape of Good Hope.

The petition of A.B. of . . . .

Humbly sheweth—

1. That (*here briefly set forth the cause of action, as for instance*) your petitioner was, on the . . . . day of . . . . engaged by C.D. of . . . . to be governess to his children at the farm . . . . in the district of . . . . at a salary of £ . . . . sterling per annum payable monthly, for a period of 3 years, calculated from the . . . . day of . . . .

2. That your petitioner duly entered on her duties and, from time to time, as her monthly salary became due, requested payment thereof, but was postponed by the said C.D., who always gave, as an excuse, that he had no ready cash with him and that he would pay her when next he should go to the village.

3. That your petitioner, in constant hope of being paid, continued with her duty as governess until the . . . . day of . . . ., a period of 9 months since she entered on her engagements, when the said C.D., without any cause whatever, told your petitioner her services were no longer required, and that she might leave the farm on the first opportunity.

4. That your petitioner has both written and spoken to the said C.D. about his conduct, and has asked him for a reason for such a step, but he has evaded all questions and neglected to answer any of the letters.

5. Your petitioner respectfully submits that she is entitled to sue the said C.D. for the arrear salary due and for damage for the unexpired

period of her engagement; and she is desirous of instituting an action against the said C.D. for recovering the sum of £ . . ., being the amount equal to three years' salary, but she is poor and is not possessed of property to the amount of £10 sterling in value, save and except her wearing apparel.

Wherefore your petitioner humbly prays that your Lordships may be pleased to allow her to sue *in formâ pauperis* the said C.D. for recovering the said sum of £ . . . . by reason of his breach of contract as aforesaid; and that your Lordships may further be pleased to assign her an advocate and an attorney to act for her in the said suit, in their respective professional capacities.

And your petitioner as in duty bound will ever pray.

(*Affidavit of Verification.*)

Affidavit of two householders in support of the foregoing.

(Heading of case.)

We, E.F. and G.H. of . . . . jointly and severally make oath and say that we are householders living in the neighbourhood of the said A.B., the plaintiff in this case, and that we are well acquainted with her and know her to be poor and not possessed of property to the amount of £10 save and except her wearing apparel.

E.F.
G.H.

Sworn by both
before me, at Cape Town
this . . . . day of . . . .

. . . . . .
J.P.

CHAPTER XVIII.

SPOLIATION.

SPOLIATION is a remedy borrowed from the Canon law and, as in temporary interdicts, or Rules *Nisi*, was introduced for the purpose of meeting a case of emergency, and of protecting a person in his property where, otherwise, by the tedious process of an action at law, this could not be done with the same speedy result and satisfaction. This remedy is alternately called a "*mandament*," or a "*writ of spolie*," or "*spoliation*." It is a mandament, because it is really an order of the Court; and it is a writ, because the order sometimes takes the nature of a writ of attachment. This mandament, or writ, is asked for where a person has been forcibly, or secretly, dispossessed or deprived of his property, and it is necessary or expedient that he should be immediately reinstated in it. The applicant must therefore petition the Court, setting forth his right to the goods or property he is forcibly, or secretly, dispossessed of; and must state under what circumstances, and when, and where, and how, and by whom he has been deprived of them, and what is the reason of the urgency of his application, and the probable or immediate loss he anticipates; and, if he moves the Court *ex parte* instead of giving notice of motion, he must conclude with a prayer in his petition to be reinstated in possession of the property, goods or articles he has been so unlawfully deprived of. The rule is "*Spoliatus ante omnia est restituendus*": therefore, before the respondent is allowed any defence on the merits to such an order or rule, he must first reinstate the applicant in his possession of the property or goods

taken from him. Though sometimes the application is by notice of motion, it is, most frequently, *ex parte*, on petition; but, whichever it is, it is sufficient, if the Court is satisfied as to the applicant's *primâ facie* right, to grant a peremptory order of restitution of the goods or property before the respondent can be allowed to enter into his defence on the merits. Of course the respondent is heard in answer to the application, but sufficient only is heard to shew who ought really to be in possession of the property or articles, &c., pending a settlement of the dispute about them. If there is an admission by the respondent, or if he cannot deny that he did deprive the applicant of the possession, it is no use his opposing the application, and he had better proceed with his action for a declaration of rights, and so go into the merits of the case. At first sight this remedy of a restitution may seem a severe or an unjust one; but it is not so. No one has a right forcibly, or secretly, to deprive another of property *bonâ fide* in his possession. When once this is allowed, there will be no security against the villainy of dishonest people, who might make away with the things or property before an action regarding them can be decided. It is easy to talk of compensation, but this is frequently useless; whereas, if a man can maintain his right to property *bonâ fide* and lawfully in his possession, no harm is done to the respondent, who may still be able to establish his rights to them. But the Court must be satisfied from the petition that the applicant has, *primâ facie*, a *bonâ fide* lawful possession of the property or of the articles and goods at the time of the dispossession. It has happened that, though *primâ facie* the applicant, on the day of the order being given, had a greater right to the goods, the respondent has nevertheless succeeded in proving, at the trial, that he, and not the applicant, was really entitled to them. Of course if any loss should be sustained by either party by reason of the detention of the property, or of the goods, he has his remedy in an action for damages.

In this application the Court, or Judge, may either make the order absolute at once; or after hearing the applicant *ex parte* may refuse it, or grant it, or vary it; and may also

order the parties to proceed to an action, or not.[1] If no action is ordered, and the order is not made perpetual, either party may move for the discharge or setting aside of the order; or may institute an action for a declaration of rights. But where the Court has fixed no time for either party to institute an action, he who wishes to bring it must do so within a reasonable time.

Unless the Court has ordered the applicant to detain the property, goods or articles, &c., pending the result of an action, he may do with them what he pleases; but the Court has the power to order him to give security for the production of the articles, &c., or their value, at the termination of the suit, should he be condemned in the action.

Sometimes, in granting the order for restitution, it is accompanied with an order for a temporary interdict; but this is only in case there is reason to believe that the respondent may again have an opportunity to remove the articles, or otherwise interfere with the property, before the decision of the action; otherwise the interdict part of the order is unnecessary.

Though the term "*writ* of spoliation" is most usually used with us in speaking of this remedy, as a matter of fact the order given by the Court or Judge amounts usually to either a rule *nisi* or an interdict. Still, instead of ordering the respondent to restore to the applicant his property by a fixed time, the Court may grant a *writ* ordering the Sheriff to attach the property at once, and either to place applicant in possession thereof, or to hold it, pending the result of an action, or till the further order of the Court.[2]

[1] See also *Connell* vs. *Factor and Lex*, 6 C. T., 100.

[2] V. d. Linden, 1, 13, 3; and Ibid, 3, 5, 4; *McLaughlan* vs. *Delahunt*, 1 F., 129; *Executor of Haupt* vs. *De Villiers*, 3 M., 341; *Swanepoel* vs. *v.d. Hoever*, B. for 1878, p. 4; *Solomon* vs. *Wolfe*, 1 C. T., 224; and *Benson* vs. *Van Wyk and another*, in September, 1892.

PETITION FOR SPOLIATION.

To get back sheep.

(Usual heading.)

Humbly sheweth—

1. That your petitioner is the owner of the farm . . . . situate in the district of . . . ., and has on the farm several flocks of sheep, some of his own breeding and others bought by him for the purpose of slaughter and of speculation.

2. That across this farm is a public road frequently used by the public.

3. That C.D. of . . . . is a transport-rider and also buys and speculates in sheep; and that on the . . . . day of . . . ., at a public auction held at the farm . . . ., in the said district, he and your petitioner bought sheep to the number of about 3,000 each.

4. That the sheep your petitioner bought were on the same day removed to your petitioner's said farm, and are superior in fleece and wool to those bought by the said C.D.

5. That, on the day thereafter, your petitioner sold to the said C.D. 1,500 of the sheep so bought, at 15*s.* apiece, on condition that payment be made before delivery, and he exchanged the remaining 1,500 with the said C.D. for three spans of mules and three wagons, a covered cart and a pair of horses, on condition that these were delivered to him at his said farm within fourteen days thereafter, and that the sheep so exchanged remain on the said farm for a month to rest.

6. That two days after the said sale, viz. on the . . . . day of . . . . the sheep bought by the said C.D. at the said sale were driven about 100 yards from the said public road, across your petitioner's said farm, in three flocks, at distances of about 1,000 yards from each other, each flock being in charge of two herds.

7. That while so driving the sheep, and towards nightfall, they got mixed with some of the said sheep bought by your petitioner, and, owing to darkness setting in, it was impossible to separate them all that evening, and he told the herds of C.D. not to move their sheep next morning till his arrival, to which they agreed. The next morning, early, your petitioner had the remainder of his flock counted, and found that 405 of his said flock were missing. He therefore at once proceeded to the spot where he left the sheep of the said C.D. the previous evening and found them gone; and, upon following up the spoor he overtook them, about twelve miles distant, upon the public road across the farm . . . . belonging to E.F. Upon remonstrating with the herds for removing their sheep before his own were counted out or separated, they replied that they did so upon the order of the said C.D. who passed them about midnight, and who, when they told him of the accidental mixing of the sheep, said it did not matter as he had bought all your petitioner's sheep. Your petitioner therefore made an effort to separate his own sheep from the others, but the herds would not permit him and prevented him. Your petitioner says further that his sheep are easily distinguished from those of the said C.D., because of their superiority; and from your petitioner's

knowledge of judging of the number of sheep in flocks, he has every reason to believe that the whole of the said 405 sheep which he missed from his own flock are among the sheep of the said C.D.

8. As the sheep were being driven towards the Cape Town market, your petitioner has every reason to believe that they will be sold to the butchers (especially your petitioner's sheep which are more fit for slaughter and to be slaughtered), before an action can be instituted for their restitution; and your petitioner further says that none of the conditions upon which he sold some and exchanged the other sheep have been fulfilled; and that unless an order be given re-investing him with the possession of the sheep, he would be a serious loser.

Wherefore your petitioner humbly prays that your Lordships may be pleased to grant a peremptory order on the said C.D., or on his herds, or on any one who may be in possession of them, immediately to restore to, and put your petitioner in possession of the said sheep so unlawfully and secretly taken and detained by the said C.D., or his herds, or by his orders; or to grant to your petitioner such further or other relief in the premises as your Lordships shall think fit.

And your petitioner as in duty bound will ever pray.

(*Affidavit of Verification.*)

ANOTHER FORM.

To be re-invested in a building.

(Usual heading.)

Humbly sheweth—

1. That your petitioner is the lessee of the building called . . . . situate in this town, by virtue of the lease bearing date the . . . . day of . . . ., hereunto annexed, with C.D., the owner of the property.

2. That your petitioner carries on a . . . . factory in the said building, and it is necessary that operations be constantly watched and the heating apparatus be continually varied according to the degree of heat required in the several stages of the processes; and therefore any stoppages in the work, or interference therewith, would necessarily be detrimental and cause serious injury.

3. That the said C.D., this morning, while the engine-driver and the chief overseer of the works were the only persons in the building, entered the front door and locked all doors and took possession of the keys, and placed several persons inside the outer doors to prevent any one coming in; and ordered the engine-driver to put out his fires and ordered the overseer to leave the building at once, which, though they at first refused, they were forced to obey through threats of violence being held out to them. No reason for this step was assigned by the said C.D. beyond his allegations to the overseer that his rent is largely in arrears, and that as he saw no chance of getting paid sooner, he would have his revenge.

4. That about . . . . men and women are daily employed in the said factory; and this act on the part of the said C.D. is causing very serious injury, loss and expense to your petitioner.

Wherefore your petitioner prays that your Lordships will be pleased to grant an order compelling the said C.D. forthwith to quit the said building with his men, and to give up the keys thereof to your petitioner, so as to enable your petitioner with all his workmen immediately to take free and undisturbed possession of the said building; or to order a writ to issue directed to the High Sheriff forthwith to eject all the men from the building and, if necessary, to take forcible possession thereof; and to reinstate your petitioner in the possession of the building; or to grant your petitioner such further or other relief in the premises as to your Lordships may seem meet.

And your petitioner as in duty bound will ever pray.

(*Affidavit of Verification.*)

CHAPTER XIX.

MOTIONS.

A MOTION is an application from the Bar, either *mero motu*, as where, from the urgency or unexpectedness of a matter, it has become necessary for counsel, without notice or petition, to ask the Court for information or directions, or a ruling, or an indulgence; or it is made by petition upon an *ex parte* application; or it is made after due notice thereof to the opposite party.

An *ex parte* application should be by petition to the Court, and is one where either the petitioner only, and no one else, is concerned, as, for instance, one by which the rights of others or of third parties cannot be affected; or where, in cases of emergency, no notice has been or can be given or is expedient to be given to the other party, till a temporary order for relief can be obtained.

In Holland all applications to the Court must be either by Summons or by Petition. The practice of serving notices of motion is not in force there, but was derived by us from England, and was only really introduced here since the establishment of the present Supreme Court. With us, wherever we have no law or a Rule of Court on the subject, we cannot serve a Notice, but must proceed by Summons or by Petition, though sometimes, in cases of urgency, the Court will waive this strict requirement. But whatever process the Legislature or a Rule of Court has declared, we must follow. Thus, to compel an executor to file an account of his administration, he must be *summoned;* while to compel a trustee of an insolvent estate to file an account of his administration, he must be served with a *notice of motion.*

The first thing therefore to ascertain is whether by any local law, or rule, or long established practice, we must, in the particular steps to be taken, do so by notice of motion or not: if not, then we follow the Dutch practice, and begin, according to the circumstances of the case, either by Summons or by Petition;—by Summons where any future or permanent rights are to be ascertained or settled; by Petition where any temporary, or interlocutory, or purely *ex parte*, matter only is concerned.

The first Rule of Court we have on the subject is the 6th, which says that—

"All *motions*, or special applications to the Court, shall be supported by "affidavits of the facts, or circumstances, upon which the same are made."

The next Rule is the 41st, which says that—

"All memorials, petitions, and special applications to this Court shall be "brought before the Court by *motion*, in manner appointed for motions "by the 6th Rule of this Court."

Now the words "in manner appointed for motions," &c., mean that "all memorials," &c., must be "supported by affidavits "of the facts," &c.; but in the Chapter on "Affidavits" I have pointed out that, instead of making an affidavit that would only be a repetition of a petition, a common practice, sanctioned by the Court, has been introduced of making an affidavit of verification at the foot of the Memorial or Petition.

In the matter of *Bourhill*[1] the Court intimated that for the future all petitions affecting minors' moneys with the Master should, before presentment to the Court, be submitted to the Master for his report thereon. So also subsequently in another matter, where the petitioner applied for leave to make certain amendments to a deed in the Deeds Registry Office, the Court intimated that the precedent in *Bourhill's* case should be followed, and the Registrar of Deeds' Report on the petition be obtained before its presentment to the Court.[2]

No time is specified for the return day of any notice of motion where the parties have not yet appeared by their

[1] 2 C. T., 147.

[2] See also a similar order in a later case, *re Copeland's Liquidator* vs. *Coleman*, 9 J., 229.

attorneys. All that is required is a "reasonable time," which must be judged of according to the nature of the application, and the distance of the respondent's residence or place of business from the Court, and his means of communication; but this time may, according to the circumstances of each case, be extended by the Court upon the application of either party. But when once the parties have appeared in Court by their respective attorneys, 48 hours' previous notice is required of every notice of motion, except in cases of great urgency when the Court is satisfied there should be no delay.[1] Thus, for instance, in the cases of *Hoeftman* vs. *Meyer* in 1876, and *Sidman* vs. *McLoughlin* in 1879 (neither of which is reported), the Court held two hours' notice sufficient for the application to have certain witnesses examined *de bene esse*, who were on the point of leaving, in the one case for foreign ports, and in the other for the seat of the then Colonial war. But in the case of a discharge from arrest only 24 hours' notice is required.[2]

Every notice of motion to the Court must specify its object,[3] and the facts or circumstances in support thereof should be set forth in an affidavit.[4] *A copy of the affidavit should be served together with a copy of the notice;* and when the affidavit is not so served, it shall not be used without the special order of the Court; also a copy of such notice shall be filed with the Registrar before noon on the day before the application.[5]

The notice must furthermore state the names of the parties, and the day and Court on which and where the motion is to be made, or before what Judge. A notice may contain several objects, and must be addressed to the party, or, when he has appeared by his attorney, to such attorney. When the parties have appeared by their attorneys, all further notices and affidavits must be served on such attorneys before six o'clock at night, unless otherwise specially ordered by the Court.[6]

[1] Rule 147; *King* vs. *Porter, Hodgson & Co.*, B. for 1879, p. 117; and *Gamble* vs. *Sauer*, decided 12th December, 1890, not reported.

[2] Rule 135, and *re Helman*, 4 J., 334.

[3] Rule 147.

[4] Rule 6.

[5] Rules 41, 245 and 258.

[6] Rule 17.

If the Court should think that the matter can better be heard on an action than on a motion, it may order an action to be brought, and the notice of motion already given will stand in the place of a summons.

If the party who has given notice of motion fails to appear, the other party served and appearing is entitled to his costs; but a party served, who is not bound to appear because of the apparent defect of the notice, but does so, is not entitled to his costs, except where there is no jurisdiction, in which case he may inform the Court of the absence of jurisdiction.[1]

Besides these general remarks on Motions, there are also motions on special subjects, such as Arrests, Appeals, Writs, *In formâ pauperis*, &c., regarding which see those Chapters.

Form of notice of motion.

In the Supreme Court of the Colony of the Cape of Good Hope.

Between A.B., Applicant,
and
C.D., Respondent.

Sir,—Take notice that application will be made on behalf of A.B. the above applicant to this Honourable Court on the . . . . day of . . . . at ten o'clock in the forenoon, at which time you will be required to shew cause if any (*here specify the object of the notice, for instance*) why an order shall not issue from this Honourable Court compelling you to attend before . . . . of this city, Barrister-at-Law, a Commissioner appointed for that purpose by the Court of Queen's Bench in England, and there and then to give your evidence and to answer all such lawful questions as shall be put to you in a cause now pending in the Court of Queen's Bench between the said A.B. and one E.F. as to certain subterranean rights passing through their properties at . . . . in England; or why this Honourable Court shall not authorise and allow the said applicant to issue a subpœna for your attendance before the said Commissioner, and to shew cause also why you shall not be ordered to pay the costs of this application.

Dated at Cape Town this . . . . day of . . . .

Yours, &c.

. . . . . .
Applicant's Attorney.

To C.D.
of . . . .
the above Respondent.

(*For such an order see Chapter* 20, *Victoria* 22, § 1 *of April*, 1859, *and motion to the Supreme Court on* 13*th March*, 1876, re Dunlop and others *vs.* Hamilton, *not reported.*)

[1] *Berry* vs. *Exchange Trading Co.*, L.R., 1 Q.B.D. 77; *Danbury* vs. *Shuttleworth*, L.R. 1, Ex. D. 53; *Great Northern Committee* vs. *Inett*, 1 L.R., 2 Q.B.D. 284.

Form of affidavit in support.

In the Supreme Court of the Colony of the Cape of Good Hope.

Between A.B., Applicant,
and
C.D., Respondent.

I, A.B. of . . . . the above applicant, merchant, make oath and say (*here briefly and explicitly give the facts or circumstances relied on; for instance*):—

1. That there is a suit pending in the Court of Queen's Bench in England between E.F. and myself as to certain subterranean rights passing through our properties at . . . . in England.

2. That a Commission has been sent out by the said Court to Mr. Advocate . . . . of this city to take the evidence of the said C.D., the respondent, who is a civil and hydraulic engineer, and is now practising as such in this city.

3. That the said C.D. is fully cognizant of the questions at issue between the said E.F. and myself, and is a material witness on my behalf, but upon application to him he has declined to give evidence.

4. That the only means I have of compelling the said C.D. to give evidence before the said Commissioner is to obtain an order to that effect from this Honourable Court, or for leave to issue a subpœna for his attendance.

5. That the said Commission is returnable on the . . . . day of . . . ., and that I cannot safely go to trial without the evidence of the said C.D.

A.B.

Sworn before me, &c.

CHAPTER XX.

AFFIDAVITS.

AN affidavit means a solemn assurance of a fact known to the person who states it, and sworn to as his statement before some person in authority, such as a Judge, or a Magistrate, or a Justice of the Peace, or a Commissioner of the Court. Affidavits were not used in practice in the Courts of Holland; their introduction is from the English practice, and their origin arose in this way. Whenever, for whatever reason, a witness could not be examined *vivâ voce*, a Commission was issued to take his evidence and reduce it to writing, and this statement was used at the trial as his evidence. In course of time the Commissioner came to take the evidence, not by order of a Judge or Court, but at the request of either party to the suit; and this course, being found convenient, was generally adopted and followed in England. In this Colony, since the establishment of the Supreme Court in place of the old Court of Justice and the appointment of Judges to the Court from among barristers in the United Kingdom, the use of affidavits, especially in provisional sentence cases, and on motions, was found to be convenient; and they were gradually adopted in our practice, and are now also recognised by the Legislature. We therefore follow the English law and practice as to the form and requisites of an affidavit with such decisions as our own Courts have given on the subject.

For any false statement in an affidavit, the party swearing to it is liable to be prosecuted and punished for perjury in the same way as in *vivâ voce* evidence. The punishment for

perjury, formerly, was death, but, by custom, it has now become discretionary for a Judge to pass any sentence short of death.

Formerly affidavits were drawn in the third person. In this the old English practice was followed. The constant repetition of "And this deponent further saith," where the simple words "I say" would suffice, became very monotonous. The first person to break this rule in the Colony was a former Attorney-General, the late Mr. Porter, who, in 1856, having to make an affidavit in the insolvent estate of Home, Eager & Co., began it by saying, "That for the purpose of better explaining these matters I speak in the first, instead of in the third, person." But no one continued the convenient change started by Mr. Porter, except that from the time of my admission long after, as attorney, I followed his example in all affidavits I drew. The practice may now be said to have become customary, and is general. In England the custom of drawing affidavits in the third person dates far back, but from 1875 they had to be drawn in the first person. We have no imperative rule on the subject, but from the Form No. 2, given under Rule 333 *c*, which is in the first person, we may conclude that the Court prefers the modern practice.

An affidavit should be divided into paragraphs; and every paragraph should be numbered consecutively, and contain a distinct allegation of fact, and should, as nearly as possible, be confined to a distinct portion of the subject.

An affidavit should contain no opinion of the deponent, nor inferences, but only the bare facts; and the facts should be, not from information received, but such as he is able, of his own knowledge, to prove; except in interlocutory motions on which statements as to his belief, *with the grounds thereof*, may be admitted. For instance, not in final matters, but in temporary applications, a man may say: "I have been informed by . . . . of . . . ., that" (*here giving the fact*), "which information I verily believe to be true;" or, "I annex hereto a telegram received from . . . . of . . . ., which information I believe to be true." This, although not conclusive evidence of the fact sworn to, entitles the affidavit to some credit in

the absence of a contrary affidavit.[1] The object of this latitude in allowing a person to swear as to his belief of certain facts is to grant temporary relief in the absence of better or more positive evidence; but in the final consideration of the matter this "belief" statement must be confirmed by the usual rule of the "best evidence." Of course, if a vague statement is made, the affidavit can be refused, or the person can be compelled to give the "grounds of his belief." But evidence on information as to belief is not admissible upon a motion which, though temporary or interlocutory in form, finally decides the rights of the parties.[2]

An affidavit should not unnecessarily set forth matters of hearsay, or any argumentative or irrelevant matter: else the Court can order it to be taken off the file. So also can a scandalous affidavit be refused by the Court; or, if filed, be ordered to be taken off the file; or the scandalous matter may be ordered to be expunged.[3]

An affidavit should be on foolscap paper, written bookwise, with a proper margin, and be intituled with the name of the Court and the name of the case in which it is to be used: that is, the heading of the affidavit should state the Court in which it is to be used and the names of the parties to the proceedings; and it must be sworn to before a person having authority to administer such oath. It must contain the *jurat;* that is, the date and place, when and where it was sworn to, and before whom; and this must be at the foot thereof. It must contain no prayer:—petitions only should conclude with a prayer. All interlineations, alterations, or erasures should be duly authenticated by the party swearing to the affidavit as well as by the party before whom it is sworn, by their putting their initials in the margin of the affidavit opposite to the words inserted or struck out. But a more safe course would be, as required by the Privy Council practice, for the words interlineated, altered, or erased to be mentioned in the margin of the affidavit, *e.g.*, "the words x y z are inserted in line . . . between the words

[1] *Maton* vs. *Hayter*, 3 Jur., 769.
[2] *Gilbert* vs. *Endear*, L. Rep. 9, Ch. Div. 259, 39 L. T., 404.
[3] *Clarkwell* vs. *Jameson*, 39 L.T. 31; Daniell's Chan. Prac., 296.

d e f and the words a b c; or, the words p q r are erased in line . . . ., &c." And all schedules or annexures to an affidavit should be distinctly marked, and be described by that mark, and be also authenticated by the party before whom the affidavit is sworn, by his writing on it something like this:—"This is the annexure 'A' (or 'B') referred to "in the foregoing affidavit;" or, more specifically, "This "document 'A' is the document marked 'A' referred to in "paragraph . . . . of the affidavit dated . . . . day of . . . ., "sworn before me this . . . . day of . . . .," and then by putting his initials thereto. If there are two or more deponents, the affidavit should state whether all swear to the same facts; thus, "they jointly and severally make "oath and say:" but if all swear to one fact and some only to other facts, it should clearly appear from the affidavit to which set of facts all, or some of them only, swear; thus "A, B, C, and D jointly and severally swear as follows "(*here stating what they swear to*), and B, for himself, swears "as follows (*here stating the fact*), and the said A, with D, "swear as follows (*here stating the fact*)." A joint affidavit not only saves expense, but sometimes certain facts can best be explained by a joint affidavit, though, in one or two particulars, one of the parties alone can swear to a fact.

Affidavits should not be unnecessarily multiplied; therefore, where two or more persons have to swear to the same facts, they should, when possible, make a joint affidavit; not that the Court will refuse to admit separate affidavits, but that it is in the discretion of the taxing officer to disallow them in the taxation of costs. In the case of two or more persons swearing to the affidavit at the same time and before the same officer, it is sufficient if the form of the *jurat* usual in the case of one person is used. Sometimes the form is:—"Sworn by all the above-named deponents." But if they swear at different times, or before different officers, the *jurat* should say so, or there should be several *jurats*.

It is not necessary that the officer before whom the affidavit is sworn should see it signed or know its contents, but he has a right to ascertain for himself, if he chooses, in case of any suspicion, or where the persons are illiterate or

very young, that they understand the contents of the affidavit and know what they are swearing to.[1]

Any person competent to give evidence in a Court of law can swear to an affidavit.

The oath to be administered to a person swearing to an affidavit usually is in this form:—"You swear to the truth "of this affidavit?—Say, 'So help me, God.'" If the person swears accordingly, he is then asked whether the signature at the foot of the affidavit is his. There is, however, no definite form of words for an affidavit oath as there is for *vivâ voce* evidence in a Court of law: it is sufficient, therefore, if the party, by his answer or conduct, implies the truth of the affidavit.

Each person can take the form of the oath according to his custom or his religious belief, or in whatever way he considers most binding. Some hold up the right hand, or the four fingers of the right hand, as the Scotch do; others put up the two first fingers of the right hand, as most Colonial-born men and women do. The Registrars and the Clerks of the Courts are quite used to saying: "Steek op jou twee "voor vingers." Englishmen kiss the outside of the Bible; English ladies the inside of the New Testament. In a Constitution of Justinian[2] we have the ceremony of touching the Scriptures as one of the forms of swearing.[3] The Jews keep their heads covered by putting their hats on, and some of them, in addition, put the right hand on the Pentateuch. The Malays repeat, after their priest, a certain form of words which are said to be Arabic, and which written phonetically would spell "Annalakallumsahaia, Wallah, Belah, Tollah." The first of these words is rarely given here in the original, but in Dutch, viz., "Jy moet de waarheid spreek," *i.e.*, "You "must speak the truth;" the second word means "truly," the two others "by God." The Chinese drop a saucer. A sect in India, I forget which, twist a cow's tail. In the Mosaic period the words were: "Put, I pray thee, thy hand under "my thigh."[4] Some people keep their gloves on when they take an oath; others, more reverent, take off the glove of the

[1] Daniell's Chan. Prac., 792.
[2] A.D. 529.
[3] C. 4, 1, 12, 5.
[4] Gen. xxiv. 2 and 3.

right hand. Some are in earnest about an oath; others are irreverent, callous, and indifferent. But all these forms or ceremonies, whether observed or not, have nothing whatever to do with the oath itself, which simply consists in the party's assent of truth. If, for instance, a Malay man should choose to discard the presence of his priest and swear, whether in a Court of law or to an affidavit, in the same form as any one of the other persons above-named, or unlike any of them, or observe no form whatever, his oath would be perfectly good and binding on him, and he can be punished if his affidavit, or evidence, is false. So also if the administrator of the oath, in the usual way, administers the oath to the witness, or deponent, who does not object at the time to the form, or words, used, the latter cannot afterwards claim exemption from responsibility on the ground that the form or the words used were not according to his custom of taking an oath, and he would be liable to punishment for perjury were he to swear falsely.[1]

There are some people who, on account of their religious belief, or on conscientious grounds, refuse to take an oath; such as the Moravians, Quakers, Separatists, and others; and they do so on the ground of the words in Scripture, "*Swear not at all.*" They maintain that, whether under oath or not, a man should always speak the truth, and that he must be a very bad man indeed who has to take an oath in order to compel him to speak the truth.

Courts of law had formerly no power to dispense with the necessity for an oath, or to accept any other statement in lieu of it, and they were compelled to commit for contempt of Court all those who refused to be sworn. To meet the scruples of such people the Legislatures, in England and here, have come to their aid by allowing them to "affirm" or "declare" that they will speak the truth. The original reason of the necessity for an oath was not in order to punish one for perjury, for the law might have assigned a punishment to every kind of false testimony, but it was thought that by the witness calling the Supreme Being to his aid to speak the truth, it would have a more deterrent effect on him from telling a lie.

[1] Consult "Taylor on Evidence," Vol. 2, § 1255.

Persons who say that an oath has no binding effect on them are not necessarily Atheists, nor do they say so on sacrilegious grounds; but some conscientiously say so because of their conviction that, if a man wishes to swear falsely, an oath will not restrain him, nor the fear of punishment; while others, no doubt, if they were pressed hard for a reason for refusing to take an oath, could not give it. On one occasion a witness in England admitted he could give no reason for saying an oath had no binding effect on him, but that he "only wished to imitate a great man, now dead." In a matter of this kind the Court will now-a-days be satisfied by allowing such persons to "affirm" or undertake to speak the truth.

England was the first country that allowed persons to "declare," or "affirm," instead of "swearing." With us they may also now "declare" or "affirm."[1] Though at one time the law of England was that a person who did not believe in God could not give evidence, the law is now more tolerant; and there, as well as here, every person, whether he professes any religion or not, or whether he believes in God or not, can give evidence or make an affidavit. People are not now-a-days asked, and Courts of law no longer concern themselves, about the religious belief, or otherwise, of witnesses. At one time it was the law of England that the person imposing the oath should be satisfied that the swearer believed he would be punished by the Supreme Being for violating the oath; but it is no longer the law. Most barbarians, and little children, do not understand the nature of an oath; and it would be absurd to question them upon it, or first to educate them on the subject; yet, if they swear falsely, they are punishable, and this is all the law now looks to.

Though an oath should be taken, or an affidavit sworn to, reverently, there is no means of enforcing this; and, if a person should be irreverent in his acts or conduct in calling God to witness, all the Court can do is to refuse his oath, or the party before whom the affidavit is to be sworn can refuse to administer the oath or to subscribe to the *jurat*. Thus, if a man in good health persists in sitting or lying down when

[1] § 6, Act 18 of 1891.

an oath is to be administered to him, it can be refused; so also can it be refused to a man who is drunk, or to one who, not being of the Jewish persuasion, persists in keeping on his hat, or does any other act which at the moment, in the particular instance, amounts to irreverence and is contrary to his better knowledge and belief.

Though not always absolutely necessary, yet in most cases, especially when of importance, it is advisable that the full name and address of the party making the affidavit should be given, as also his trade, profession, or calling.

If an affidavit is made by a person in his "representative capacity" that capacity should be stated; as, for instance, "Colonial Secretary," "Master of the Supreme Court," "Plaintiff's" or "Defendant's Attorney," "Book-keeper to Plaintiff or Defendant," &c.; for every statement in an affidavit should shew the source of knowledge of the party making it.

An affidavit may be sworn before any Commissioner of the Court,[1] or Magistrate, or Justice of the Peace [2] within the limits of their respective jurisdictions.[3] They get no remuneration with us for administering the oath, though in England they get one shilling for each oath.

No person can be compelled, without an order of Court, to make an affidavit, but such a party may be subpœnaed to give evidence, which subpœna he is bound to obey. The Court may, however, in a matter pending before them, compel any person to make an affidavit as to certain facts, to be specified or within his knowledge. And, of course, in what are called "Discovery Orders," the party against whom the order is made is bound to answer it by affidavit, on oath, as to the documents in his possession; but this order can only be given "during the pendency of any action or proceeding."[4]

The technical difference between an affidavit and a solemn declaration is this, that the former is used in judicial matters, the latter in extra-judicial matters. There are notwithstanding many instances where, though in non-judicial matters, persons are obliged to make an affidavit instead of a solemn

[1] Rule of Court 247.
[2] § 2, Act 18, 1891.
[3] Ibid, § 3.
[4] Rule of Court 333.

declaration; but there is no instance, except in the case of the purchase and sale of landed property, where a person is obliged to make a solemn declaration in lieu of an affidavit.

The punishment for perjury varies. In an affidavit it is in the discretion of the Court, as it is also for any *vivâ voce* false oath or any false affirmation or declaration in lieu of an oath; but in a solemn declaration, the punishment for any false or untrue statement, in any material particulars, is a penalty not exceeding £50, or imprisonment, with or without hard labour, not exceeding six months. But, instead of being prosecuted for making a false declaration, the party may be prosecuted for "fraud, or any other crime or offence of which "he may be chargeable," and then his punishment will be in the discretion of the Court.[1]

The first local rule we have on the subject of affidavits is the 6th Rule of Court, which says that all motions .... shall be supported by "*affidavits of the facts or circumstances upon* "*which the same are made.*"

Though affidavits were originally intended only for interlocutory matters, or "upon any motion, or other proceeding, "not being the trial of an action,"[2] yet, by leave of the Court or Judge, affidavits may now also be used in *trial* cases, provided the "Court or a Judge .... for sufficient reason "(previously) order that *any particular fact or facts* may be "proved by affidavit;" or that "the affidavit of any witness "may be read at the hearing or trial on such conditions as "the Court or Judge may think reasonable."[3]

Any person who has made an affidavit is liable afterwards to be subpœnaed and to be cross-examined upon it;[4] but the Court may also, on the application of either party, order, without subpœna, the attendance for cross-examination of the person making the affidavit.

An affidavit, when once filed of record, may be made use of by the opposite party, though the party who filed it may decline to use it;[5] and the Court may allow such an

[1] § 10, Act 18 of 1891.
[2] Rule 335.
[3] Rule 335a; *Excrs. of Schönnberg* vs. *Excrs. of Vos*, 3 J., 325; *Brink* vs. *Wilson and Glynn*, Ibid, 331; *The Secretary of State for War* vs. *Metropolitan Railway*, 3 C. T., 381.
[4] Rule 335c.
[5] *Price* vs. *Hayman*, 7 Dowl., 47.

affidavit as evidence, although the deponent has not been cross-examined upon it.[1]

All affidavits must be filed with the Registrar of the Court by noon the day before they are to be used in Court;[2] and *if any affidavit is made in support of a notice of motion, a copy of it must be served at the same time with such notice;* otherwise it cannot be used without the special order of the Court.[1]

Under the old practice there was no limitation as to replying to affidavits, and these frequently did not end until both sides had had their last say, and it may well be imagined how these affidavits were multiplied, and thus increased the costs and delay. But in recent years the Supreme Court has put a stop to this practice, and in many instances ordered affidavits to be limited to the applicant's reply; the object being, as in pleadings, that each side should fully set forth his case at once in his affidavits. The plaintiff, or applicant, gives his version; the defendant, or respondent, answers it, and the former replies to the answer. No rejoinders, or further affidavits, are allowed, except by leave of the Court, and then only when absolutely necessary, owing to new matter being raised in his reply by the plaintiff, or applicant. In case a defendant answers a plaintiff's claim by affidavit, as in a provisional case, he has no right of reply to the plaintiff's affidavit, as the plaintiff's summons is presumed to be his (the plaintiff's) statement of claim, which the defendant answers by affidavit and the plaintiff replies thereto. In the case of the *Bank of Africa* vs. *Wood Bros.*[4] the Chief Justice thus stated the practice:—

"The plaintiff first produces his evidence, namely, the liquid docu-
"ment: the *onus* is then on the defendant who produces his affidavits, in
"reply to which the plaintiff is allowed to produce evidence; and that
"evidence, as a general rule, closes the case."

A replying affidavit must be confined to matters strictly in reply, and, though this reply may be only confirmatory of the party's first affidavits, it is admissible.[5]

There is no time fixed within which an affidavit must be

[1] *Elias* vs. *Griffith*, 46 L.J. 806 Ch.
[2] Analogy, Rules 41 and 245.
[3] Rule 245.
[4] 4 J., 334.
[5] *Peacock* vs. *Harper*, 47 L.J. 238 Ch.

replied to, but it should be within a reasonable time, according to the circumstances and emergency of each case.

The usual and necessary expenses in the preparation of an affidavit are costs between party and party, but anything beyond that are costs between attorney and client. Thus any special study, or examination, or preparation by the person who has to swear to the affidavit has to be paid for by the client; so also must he pay the expenses of the deponents in coming or going to an officer to swear to the affidavits; or any expenses incurred in sending such an officer to them to administer the oaths, or any remuneration to the swearers for giving the information in the affidavits. I can find no reported decisions in support of this statement, but I base it on the analogy of precautionary evidence in trial cases, and of collecting evidence, or information, for the purpose of a trial,[1] and, moreover, it has been the observed practice with us.

Affidavits that have to be sent abroad require to be duly authenticated by the Colonial Secretary's certificate that the persons before whom they are sworn have authority to administer the oath. In addition thereto some countries, such as Germany and the United States, require that the affidavits shall be further authenticated by the signatures of their respective local consuls. If the affidavits are sworn before a Commissioner of the Supreme Court, who signs himself as such, the Registrar of that Court issues the certificate as to the Commissioner's authority to administer the oath.

An affidavit, though intituled in the name of a foreign Court, can nevertheless be sworn to in this country before any person having authority to administer the oath, and to swear to any Colonial affidavit. In some countries Commissioners are appointed by the foreign Courts before whom affidavits should be sworn, but this is done only to facilitate the dispensing with the authentication of affidavits to be used in those particular Courts. It in no way affects the validity of the affidavit, or tends to its rejection, if sworn before any other party having the right to administer the oath.

Our Supreme Court may also appoint Commissioners in

[1] See Chapter "*Costs.*"

foreign countries before whom affidavits, to be used in the Courts here, are to be sworn.[1] But unless sworn before such Commissioners outside the Colony the affidavit must be accompanied by a certificate authenticating the appointment of the Justice of the Peace or other person before whom it is sworn.[2]

A convenient custom has in recent years crept into our practice, of making what is called an "affidavit of verification" to a petition, by which the truth of the several allegations of the petition are verified in a few words by the affidavit, instead of, as formerly, making a separate affidavit setting forth the various clauses of the petition.

As a rule, an affidavit not clothed with all the requisites here mentioned is considered informal, and cannot be filed; but the Court will sometimes receive an informal affidavit, if satisfied as to its contents, and if there is danger of delay, and if no injury can be done to anyone by acting upon it.

(*As to forms of affidavits, they will be seen throughout this work.*)

[1] Rule 274.

[2] *Midland Agency and Trust Company* vs. *Burger*, 12 S. C. 276; *re De Jongh*, 6 C. T., 85.

CHAPTER XXI.

RULES NISI.

THE term "rule *nisi*" is derived from the English law and practice. Its origin, in our practice, is traced to the early days of the Supreme Court, when Judges to that Court were appointed from among barristers in Great Britain. The term is now, to many a young practitioner, more familiar than that of "temporary interdict." In the Chapter on "Temporary Interdicts" I have pointed out how our practice came to mix, or combine, the two terms, and in what respect they still differ.

There may be rules, or orders, granted without their being rules *nisi*. These are generally called "rules absolute in the first instance;" but if it is intended by the Court, or Judge, that an opportunity should be given to the other side to be heard, or that cause should be shewn to the contrary, then they are called rules *nisi*. In other words, unless (*nisi*) good cause be shewn to the contrary why the rule should not be granted, it is made absolute. This rule, or order, for after all it is really an order, is granted only on an *ex parte* application. This application should be by *petition setting forth fully all the circumstances of the applicant's cause of complaint, so as to induce the Court to grant his prayer.* He must shew a good *primâ facie* cause to entitle him to this rule, and a good reason must be assigned, or shewn for the urgency of the application, and why it should be *ex parte* instead of serving the respondent with a notice of motion. *If it is intended to claim costs from the party proceeded against, this should also be asked for in the petition.*[1] If the Court, or

[1] *Smit* vs. *Gabier*, in August, 1892, not reported.

Judge, should be satisfied that the delay caused by proceeding in the ordinary way would, or might, entail irreparable, or serious, mischief, the order will, as a matter of course, be granted; or such other order may be made as the Court or Judge shall think reasonable and just, under the circumstances. It is to be noticed that it is a *rule to shew cause;* thus the respondent must be given an opportunity to shew cause against it. If then the Judge is satisfied that a *primâ facie* cause for the rule has been made out, he usually, when granting it, names a day for the respondent to be heard in opposition. If no cause be shewn (hence the term *nisi*—unless) to the contrary, for the discharge of the rule, then, as a matter of course, it will be made absolute on affidavit of service of the rule. But if cause be shewn on the return day, the Court must decide on the evidence adduced; and, according to circumstances, either discharge the rule, or make it absolute, or vary it, or make such order thereon as shall seem just. But though the intention is that a *rule nisi* is *to shew cause*, yet if the Court or Judge should, for whatever reason, have made it absolute at once, without notice to the respondent, the latter will still be entitled to shew cause to the contrary, if he move within a reasonable time and shew sufficient reasons why the rule should not have been granted.

With us, owing to the term sometimes being indiscriminately used in practice, a *rule nisi* is frequently asked for, when the application should have been for a temporary interdict; and hence the order is generally granted in this form "*Rule nisi* granted, returnable on the .... day of .... "This rule in the meantime to operate as an Interdict."[1]

As a general rule, no person not included in a *rule nisi* has a right to shew cause against it; but if anyone can shew that he is affected by it, then, though he is not named in it and thus not entitled to notice, he may move the Court to have it set aside or to be heard to shew cause against it.[2]

The Court is not bound by the exact terms of the *rule nisi*, but may mould it so as to meet the justice of the case.[3]

A party who has obtained a *rule nisi* cannot be compelled

[1] See also *Swanepoel* vs. *Van der Hoeven*, B. for 1878, p. 4.

[2] *Johnson* vs. *Merriott*, 2 Dowl. 343.

[3] *Stevens* vs. *Lord*, 6 Dowl. 256.

to proceed with it; but, if the opposite party has incurred any expense in consequence thereof, he should be paid his costs.[1]

Either party may move to have a *rule nisi* enlarged upon sufficient grounds stated to the Court to induce them to do so.[2]

With a copy of the rule nisi *should also be served copies of the affidavits and petition on which the rule was granted.*[3]

If the rule is silent as to costs, and no cause has been shewn to the contrary, neither party pays costs.[4]

(*As to the forms of petitions, or affidavits, these will be seen throughout this work.*)

[1] *Doe and Harcourt* vs. *Roe*, 4 Taint. 883.

[2] *Abrahams* vs. *Davison*, 6 C. B., 622; and *R.* vs. *Anderson*, 9 Dowl. 1041, B.C.

[3] *Schoeman* vs. *de Jager*, decided in 1879, not reported.

[4] *Jeves* vs. *Hay*, 1 Sec. N. R. 399.

CHAPTER XXII.

TEMPORARY INTERDICTS.

A PERPETUAL interdict can, as a rule, be asked for only in a regularly instituted action, but not in a notice of motion or in a petition. But, when a temporary interdict has been asked for in a notice of motion or in a petition, the Court may, if the circumstances warrant it, make it perpetual on the return day of the notice or of the petition, without ordering the institution of an action. These circumstances vary. Generally the rule is that, if the matter is one which can be disposed of on the evidence and information before the Court, and when either no further evidence can be adduced, or if produced can throw no fresh light on the subject, and the parties do not shew a good reason for going into an action, then the Court will make the temporary interdict perpetual; otherwise it will simply continue the operation of the temporary interdict granted until the decision of a pending action, or of an action to be instituted. The point is thus very much in the discretion of the Court, which has to satisfy itself whether the dispute in question can be disposed of at once on the motion, or whether it would be more satisfactory to hear and see the witnesses in an action.

It is not intended here to treat of perpetual interdicts, of which there are various kinds,[1] but only of temporary interdicts, as they are of most frequent and almost of daily occurrence in the practice, and, moreover, are generally resorted to in very urgent matters. Interdicts, whether temporary or perpetual, are for various purposes and have

[1] Gaius 4, §§ 133–170.

various names, but the kind it is here contemplated to treat of is, as the word implies, *prohibitory* in its nature and effect; therefore it may be defined as "*an order, or decree, of the Court restraining a party from the execution of any act, or work, till the respective rights of that party and of the complainant can be decided by action.*"

An interdict, when made perpetual, becomes a final bar to any further proceedings, and *res judicata* may be pleaded; but a temporary interdict can be set aside either on the return day of the motion, or on the day fixed by the Court; or, if made absolute, can be set aside by action; for, so long as the Court has not declared it a perpetual interdict, it can be prevented, or set aside. It is for this reason, therefore, that a temporary interdict is not made absolute without notice to the other side, and until full enquiry has been made that no injury can be done to the opposite party. Generally —in practice—when the Court grants a temporary interdict, it contains a clause to the effect that, on a certain day therein named, the respondent is to shew cause against it.[1] Upon this point a curious mixture of our practice with the practice in England has prevailed during the last few years. In England no temporary interdict is ever asked for, but what comes, for practical purposes, to the same thing, a rule, or order, to shew cause against it, commonly called a *rule nisi*, is there moved for. This rule, if granted, simply distrains or prohibits a party from doing something, until cause be shown by him against it. Where we get a little mixed is, by asking the Court for "*a rule nisi, returnable on a certain day, but in the meantime to operate as an interdict.*" We have thus, in our practice, partly the English and partly the Dutch practice. The latter practice is simply to ask for a temporary interdict till the respondent has shewn cause against it. As already stated, both systems have the same object and the same practical effect in view; but it is to be noted that, while by the Dutch practice interdicts can be used only for the purpose of *prohibition*, by the English practice *rules nisi* may be used for a great many other purposes. But the mixture here mentioned may be said to have become

[1] V. d. Linden, 3, 4, 9.

hardened into use in our practice, and where, instead of asking for a temporary interdict, we ask for a *rule nisi*, or for both, it is for a *rule nisi* to operate temporarily as an interdict.

Temporary interdicts are obtained in one of two ways :—

(*a*) By notice of motion to the party against whom the interdict is sought.

(*b*) By an *ex parte* application by petition.

If the former, then we follow the practice stated in the Chapter on "Motions." If the latter, a petition is made to the Court, setting forth the circumstances of the complaint and praying for relief or for a temporary interdict. In the case of *Fletcher* vs. *Town Council of Cape Town*[1] the Chief Justice said :—

> "The applicant for an interdict should state to the Court not only the facts in his favour but also those which might induce the Court not to grant the interdict."

This petition, *ex parte*, is generally resorted to in cases of great emergency, either where there is no time to give notice to the opposite party, or where it is good policy not to do so, as, for instance, where one is certain that, if notice were given to the respondent, or he were to become aware of the contemplated application, he would, before such an application could be entertained by the Court or a Judge, do the very act or thing which it would be the object of the application to prevent. Such an application, without notice, would be granted only in cases of great emergency and danger, and probable injury to the applicant; but still not without an opportunity to the respondent to be heard in answer.

From the moment, therefore, that the Court or a Judge has fixed a return day for a temporary interdict obtained *ex parte* on petition, it stands in the same position as a notice of motion for an interdict to the respondent. On the return day the Court must decide if it is satisfied, either that the application is *primâ facie* too weak, in which case it must refuse the application for an interdict and leave the applicant to the remedies of an action ; or that he has made out a

[1] 3 C. T., 128.

case sufficiently strong to entitle him to have the temporary interdict made absolute, in which event the respondent must make good his position by an action; or that the case is of such a doubtful nature as to justify the Court in continuing the temporary interdict and ordering the dispute to be settled either by a then pending action or by an action to be brought; or that the parties have so fully set forth their respective claims as to cause no reason for doubt as to what the order should be, in which case the temporary interdict is either made perpetual without putting the parties to further legal proceedings, or is refused. But it is not the practice of the Court to grant a perpetual interdict on a motion. The exception to it must be a very strong and clear case. All these points must depend entirely upon the facts laid before the Court, which will rather grant an order to enable the parties to thresh out their grievances by action, than an order which will foreclose them this right.

But in order to obtain a temporary interdict—and this is a point very often overlooked—it is absolutely necessary that proof should be shewn to the Court of the following:—

(*a*) *A clear right on the part of the complainant.* If this right is of a doubtful nature, it cannot be decided in a summary way, but must be in an action on the merits; in which case the application is usually refused. If, however, the Court is satisfied that irreparable injury is likely to be caused to the applicant and no injury to the respondent, then, in its discretion, it may grant the temporary interdict and order the action to be tried by an early day named.

(*b*) *Either an injury actually committed by the respondent, or a well-grounded apprehension that such injury will be committed by him.* If, therefore, the respondent can shew that the act in itself is no injury, or that none can result from it, the applicant is not entitled to his summary request, but must institute his action.

(*c*) *That without this aid of injunction the complainant*

would have no remedy and no legal means of protecting himself.[1]

In a temporary interdict on an *ex parte* application, the Court, or Judge, is not bound to fix a return day (though this is nowadays usually done), to give the respondent an opportunity of opposing it, and thus of contesting it at once; but may grant an injunction absolutely, or conditionally, with leave to the respondent to move to have it discharged whenever he pleases.

If the application is made to the Court, the return day, whether for answering it or for trying the action, may be fixed at any reasonable time the Court pleases; but if made to a Judge during the vacation, his order shall have effect until such period during the ensuing term as he shall appoint.[2] But if the return day, whether fixed by the Court or by a Judge, is so far distant as to cause either the applicant or the respondent great injustice, or expense, owing to the latter not being allowed to shew cause against it at an earlier day than that specified, the respondent may, in the same manner as in arrests, anticipate the return day of the interdict by giving notice to that effect.[3]

In the case of Schoeman *vs.* de Jager,[4] *the Court decided that the practice for the future should be that copies of the petition and all affidavits on which the interdict, or* rule nisi, *is founded, should be served with the provisional order in all cases, and that, if not so served, it would reserve the power of refusing to make the order final or absolute: and in the case of* Smit *vs.* Gabier, *in August,* 1892,[5] *the Court decided that if a petitioner intends to claim costs from his opponent he should pray for it in his petition.*

On the return day of the order, or after the notice of motion, the party respondent will be heard in opposition

[1] Van der Linden, Jud. Prac., 2, 19; V. d. Linden, 3, 4, 7; Merula, 4, 2, 24; Van Alphen, Vol. 1, Chap. 26; *Dickson* vs. *the Town Council*, B. for 1868, p. 13; *Dell* vs. *the Town Council*, B. for 1879, p. 2; *du Toit* vs. *de Bot and Zuidemeer*, 2 J., 213-217; *Boyes and others* vs. *Brand*, 1 R., 178; *Municipality of Cape Town* vs. *Levin*, 3 J., 164; *Green Point Municipality* vs. *Metropolitan and Suburban Railway*, 8 J., 61.

[2] Rule 134.

[3] Jud. Prac., I., 2, 19, § 8.

[4] Decided in 1879, not reported.

[5] Not reported.

thereto, but he must satisfy the Court—if he wishes the injunction to be not granted, or, if granted, to be discharged —that his act or work does not injure or affect the right of the complainant, or that there really is no reason to apprehend that the act complained of will be repeated.[1]

For abating a nuisance, any one of the public who is injured, or who reasonably anticipates an injury therefrom, can take proceedings for an interdict.[2]

Petition for a temporary interdict.

To the Honourable
The Judges of the Honourable the Supreme Court of the Colony of the Cape of Good Hope.

The petition of A.B. of . . . .
Humbly sheweth :—

1. That your petitioner is the owner of a certain house and premises situate in . . . . Street in this city, and that, adjoining thereto, is the property of C.D.

2. That between your petitioner's house and the property of the said C.D. there is 16 feet of ground belonging to your petitioner, as will more fully appear from your petitioner's transfer and diagram hereunto annexed.

3. That the said C.D. has begun the foundation of a house and is encroaching on your petitioner's ground by 9 inches, in cutting the trenches for such foundation; and that unless restrained, or interdicted from so doing, he will continue with his building.

4. That your petitioner has informed the said C.D. of such encroachment and trespass on his part, but he has taken no notice of your petitioner's warning; but maintains that the ground is his, and is continuing with the foundation.

Wherefore your petitioner humbly prays that your Lordships may be pleased to grant a temporary interdict, restraining or interdicting the said C.D. from trespassing on your petitioner's ground, and from continuing with the foundation of the building aforesaid, until an action can be decided in this Honourable Court as to the ownership of the ground in question; or to grant your petitioner such further or other relief in the premises as to this Honourable Court shall seem meet, with costs.

And your petitioner as in duty bound will ever pray.

A.B.

(*Here follows affidavit of verification.*)

[1] *The Municipalities of Cape Town and Green Point* vs. *Certain Inhabitants;* decided 1868, not reported.

[2] *Dell* vs. *the Town Council,* B. for 1879, p. 2.

Notice of motion for a temporary interdict.

In the Supreme Court, &c.

Between A.B., applicant,
and C.D., respondent.

Sir,—Take notice that an application will be made to this Honourable Court on . . . . the . . . . day of . . . . at 10 o'clock in the forenoon, on behalf of the above applicant, at which time you will be required to shew cause, if any, why a temporary interdict shall not be granted by this Honourable Court restraining you from parting with certain 21 diamonds, his property, of the value of £ . . . . sterling, entrusted by E.F. to your care and custody, until the action now pending in this Honourable Court between him and the said E.F. as to the ownership of the said diamonds shall have been decided.

And to shew cause also why you shall not be ordered to pay the costs of this application.

Dated at Cape Town this . . . . day of . . . .

Yours, &c.

. . . . . .

Applicant's Attorney.

To C.D.
of . . . .
the above respondent.

Affidavit in support of the preceding notice.

(Heading as above.)

I, A.B. of . . . ., the above applicant, make oath and say :—

1. That on the . . . . day of . . . ., while at Kimberley, I entrusted to E.F., then also of that place, certain 21 diamonds to be transmitted to England to be disposed of there to the best advantage, and to account to me for the proceeds thereof, and on which I had to pay him, by way of his commission, 15 per cent.

2. That, after waiting for several months, I found the said E.F. had not transmitted the said diamonds, and that he had them still in his possession.

3. That on the . . . . day of . . . . I commenced an action in this Honourable Court against the said E.F. for the restitution of the said diamonds, or to pay their value, the sum of £3,335 17*s.* 6*d.*, which said action is still pending, but the defendant has not yet pleaded.

4. That this morning I found out that the said E.F. had parted with the diamonds to the said respondent, to whom he had entrusted them for safe custody.

5. That I had suggested to the said E.F. as well as to the said respondent that the diamonds should be deposited with some disinterested and trustworthy person, or in some bank, pending the decision of the said case, and to be given up to whichever party this Honourable Court

should declare to be entitled to them; but the said C.D. declined this offer, while the respondent said he had *bonâ fide* purchased the diamonds, and intends to transmit them by next mail to England, or elsewhere, as his own property, to be realized for his own benefit.

6. That unless the said respondent be restrained from parting with the said diamonds, I verily believe he will send them away by the steamer which leaves here to-morrow afternoon for England.

A.B.

Sworn at, &c.

CHAPTER XXIII.

COMMISSIONS "DE BENE ESSE."

De bene esse is a law term which literally means "*as being well done for the present*," but which in practice, as here used, means *conditionally*. Thus, if a witness, for whatever good cause, cannot be present at a trial, the Court grants a Commission, with a Commissioner specially appointed, to take his evidence. Such evidence so to be taken is said to be *de bene esse*, that is, "conditional"; the *condition* being, that the evidence shall be used only if the witness should not be present at the trial; but if the witness appear, it is not to be used, and he is to give his evidence *vivâ voce*.

The term *de bene esse* is derived from the English practice. In the Dutch practice the Commission and the evidence taken were called *enqueste valetudinaire*, that is, literally, "enquiry in case of health"; but which here means "enquiry, and the examination of witnesses who are old, or ill, or who it is feared may die soon." In course of time this was not limited to dangerous illness or approaching death of the witnesses, but was extended to all causes satisfactory to the Court. In our practice we never use the term *enqueste valetudinaire*, but always *de bene esse;* because, I presume, it has been adopted in the Charter of Justice, § 46, and in Ord. 72, § 40, and has become familiar to us. But both terms have come to be used as having the same meaning, are founded on the same principles, and have the same practical consequences; and though our Rule of Court 35 says that the witnesses may be examined "conditionally," yet in an application to the Court for a commission, and in all other

proceedings in connection therewith, we use the term *de bene esse.*

The practice of appointing Commissioners to examine witnesses had been in use in Holland long before any statutory enactment thereon. Commissioners of the Court were, however, formally recognised by the Placaat of the 20th August, 1531, §§ 126 to 131;[1] and the taking of evidence by Commission, *enqueste valetudinaire,* finally received legal sanction in another Placaat of the 21st December, 1579,[2] the 19th Section of which is as follows:—

"So, also, at the request of the parties to the Court, shall henceforth be allowed *enqueste valetudinaire* for good reasons in law, and the evidence so taken shall be preserved as may be ordered by the Court, according to law."

No hard-and-fast rule can be laid down in a matter which is so much in the discretion of the Court, and where so much depends upon the circumstances of each case, as to what witnesses shall be heard, or on what grounds the Court will allow them to be examined, before a Commission. Each application must depend on its own merits. The importance of the cause or its magnitude; the probability of a conflict of evidence, and thus the advantage of seeing the witnesses, and of judging of their demeanour and behaviour in the box, and of the manner in which they give their evidence; also the likelihood of no inconvenience or hardship either for the witnesses or for the parties to the suit, in having the former before the Court, are all weighty ingredients in the consideration of an application for a Commission *de bene esse,* especially when it is opposed by the other side.

The Court must exercise its own discretion, and if satisfied from the nature of the case, or the poverty of the party requiring the witnesses, or the expense of producing them, or the distance they have to travel, or the inconvenience or danger of travelling to attend the trial, or the nature of the evidence they are to give, and if no conflict is anticipated, and above all if justice can be equally secured, it will grant the order.

[1] G.P.B., Vol. 2, p. 703, and the Placaat of the 21st December, 1579, § 17; Ibid, p. 763.

[2] Ibid, 771.

There are many cases decided in which the Court has refused the application, though both sides have consented to it, thinking it better that the witnesses who could be present at the trial should be present. There are also instances where witnesses have been served with subpœna, but on the party subpœnaing making application to have them examined by Commission, the Court has refused it. There are also instances in which the Court has granted the application under similar circumstances. When a witness has not been served with a subpœna, and he has made his preparations to leave the country by a certain day before the trial, the Court usually grants a commission. If, on the news of his contemplated departure, he is served with a subpœna by either party who refuses to apply for a commission, the witness may himself apply to the Court to have his evidence so taken. Again, there are instances where the parties have applied for a commission, but the Court has refused it, and granted a removal of the case to another Court in the neighbourhood of the witnesses. There are also instances where a removal of the case has been applied for but refused, and the Court has granted a commission instead.

It is also in the discretion of the Court whether a commission to examine witnesses abroad shall be granted or not.[1]

There have been so many cases decided for and against granting or refusing applications for commissions *de bene esse*, that it is needless to quote any here: the following examples may, however, be given as showing under what circumstances the Court usually grants a commission:—

1st. In the case of all those who are out of the jurisdiction of the Court:

2nd. Of those who, though within the jurisdiction of the Court, come under any of the following headings:—

(*a*) Those who are too old and infirm to attend the Court.

(*b*) Women near their confinement, if there is probable cause of risk to health or premature birth.

(*c*) Those who have any serious illness, or are of general weak health.

[1] *Re Imperial Land Company of Marseilles*, 37 L. T., 588; and *Morgan* vs. *Hiddingh*, 8 C. T., 318.

(*d*) Sailors who are on the point of leaving by their ship.

(*e*) Officers and soldiers who are on the point of leaving with, or to join, their regiments.

(*f*) Passengers or travellers who, before they were subpœnaed, had made arrangements to leave the country by a particular day and by a particular opportunity.

(*g*) Those who live at such a distance as to render it too expensive to bring them before the Court.

(*h*) Those who might be prevented from attending by reason of a dangerous epidemic at the place where the trial is to be held.

(*i*) Those, generally, who, for any other lawful reason, satisfactory to the Court, cannot attend, except at great danger and inconvenience, or expense or delay.[1]

(*j*) So also a suitor who is too poor to attend the trial.[2]

The evidence of every witness must be on oath, and if he declines to swear or affirm, this should be noted by the Commissioner. The witnesses must sign their statements, or put their mark to them, and if they decline, or are unable to do so, this should be certified to by the Commissioner, stating the grounds for their refusal or inability. The refusal to sign a statement will not render it useless, but it is a ground for the Court to punish a witness for contempt if he is within reach.

If the depositions of witnesses are taken in a foreign language, they should be translated into the language in use by the Court issuing the Commission before they can be read at the trial. Though a witness has given his evidence before a Commissioner, if he can conveniently be present at the trial, he should be produced, unless the Court dispenses with his attendance.

If a witness, after being duly subpœnaed, refuses to attend, he must be reported to the Court, and an order obtained from the Court.[3] By the 35th Rule of Court it is provided that—

"whenever the testimony of any witness is in danger of being lost . . . . either party desiring his testimony shall apply . . . . on motion . . . . upon

[1] For these general principles consult Merula, 4, 65, 18; Vroman, 3, 27; Gail, 1, 92; and Van Alphen, Vol. 1, pp. 599, 723, and 725.

[2] *Eyth* vs. *Eyth*, 6 C. T., 33.

[3] Daniell's Chancery Practice, p. 804–5.

affidavit . . . . setting forth the particular circumstances under which the same is made, that the said witness may be forthwith examined conditionally . . . . before a Commissioner . . . . *and the said Court or Judge shall thereupon make such order as the justice of the case may require.*"

Though from this Rule it may be inferred that the evidence of "those witnesses only can be taken by Commission whose testimony is in danger of being lost," yet this is not so. The law of Holland gives the Court absolute discretion in such matters to act according to the justice of the case, and this Rule cannot alter that law: and, as a matter of fact, most applications now-a-days are on other grounds than the apprehended danger of the loss of a witness's testimony, and the Court has frequently, where there was no allegation of the anticipated loss of testimony, granted applications for a commission.

To obtain this commission either party to a suit may apply to the Court, by motion, after due notice thereof to his opponent. The motion should be supported by an affidavit, setting forth the names and addresses of the witnesses proposed to be examined, and giving the reasons why they cannot attend the trial; or, if their evidence is in danger of being lost, stating the reasons and adding that the evidence is material to the cause. Generally in trial cases, and in unopposed applications, and especially when the commission is a joint one, the Court will not insist upon the names and addresses of the witnesses being given, but an order in general terms will be made to "examine all such witnesses as may be produced by either party." If, however, the commission is to examine witnesses abroad, the names and addresses must, as a rule, be given; and there should be a general allegation, in case of an opposition, as to what they are expected to prove.[1] But where there is no opposition to the application, or the commission is a joint one, and the Court is satisfied that from the nature of the case or its urgency it was impossible to know, or inconvenient so soon to obtain, the names and addresses of the witnesses, then, though a foreign commission (*i.e.*, a com-

[1] Consult also *Stanton* vs. *Fergusson*, 3 G., 435.

mission to examine witnesses abroad), it will be in general terms to examine all witnesses that may be produced by the parties.

If the defendant is in default of appearance, and the plaintiff wishes for a commission, he should do it by petition to the Court, setting forth the grounds therefor. If, however, the Court should afterwards allow the defendant to oppose and to plead, the evidence so taken on commission would be useless if the defendant objected to it.[1]

In an Insolvency Commission, however, the names of the witnesses must, as a matter of course, be given in the affidavit or the petition, and none can be examined but those named in the order of Court, unless otherwise indicated in general terms, as, for instance, the "clerks of the insolvent."[2] The enquiry in insolvency may take place without there being a case pending, for there the object is only to give information to the creditors "concerning the person, trade, dealings, or estate of such insolvent," &c. But in a *pending case the usual rule is that in order to apply for a commission the pleadings must first be closed.* The reason for this is in order to avoid irrelevant or useless evidence, or so as not to give one party an undue advantage over the other by framing his pleadings in conformity with the evidence given. But, though the general rule is that the pleadings must first be closed, the *Court has the power to make an exception under special circumstances.* In England this rule was at one time most inflexibly adhered to, but it has been considerably relaxed in recent years. In Holland, however, from the earliest days the Courts have frequently exercised their discretion in exceptional cases, and granted a commission though the pleadings were not closed, and in many cases before the summons was issued, and even before the action was begun, if there was *periculum in morâ* and the evidence was in danger of being lost; and this is also our law.[3] By the English law also, now, the order will be granted when it shall appear to the Court necessary for the purposes of justice in extreme cases before

[1] See the cases of *Nelson* and of *Cohen*, further on.

[2] Ins. Ord., § 65, and *re Basson* and *re Baker*, B. for 1874, pp. 145 and 146.

[3] Merula, 4, 65, 18.

issue joined, and when without it justice will be defeated by the exclusion of material evidence.[1]

In the case of *Nelson* vs. *Nelson*[2] an edictal citation was issued, but had not yet been served, and no declaration filed. A commission was applied for by the plaintiff to examine some of the officers and servants of a steamer then about expected, but which was soon to resume her voyage after arrival. The application was granted by the Supreme Court, but subject to any objection by the defendant, if she should defend the action, on the ground that she had no opportunity of cross-examining the witnesses. The same principle was adopted by the E. D. Court in a similar case.[3] Of course it follows from these two decisions that, if the defendant has notice of the application for a commission, and does object, or if, in case he objects, his objections are overruled by the Court, the order for the examination of the witnesses will be granted unconditionally, and the defendant will not be allowed to object to the evidence at the trial, on the ground that the pleadings were not closed at the time the order was granted, or that he did not cross-examine the witnesses. In Holland, when the witnesses to be examined were within the same province, the Court would issue a commission to the Judges of the place where they resided to take their evidence on oath and return it sealed to the Court. This order was compulsory on the local Judge, and he was bound to obey it. But where the witnesses resided in another country, the Court would send a letter of request, or "Letters Requisitorial" as it was technically termed, to the Judge of the country where the witness resided, or if no special Judge was known, then in general terms to the Judges there, *ad omnes judices*, requesting them to take the depositions on oath of the witnesses named, their examination and cross-examination, and forward them to the Court issuing the letters. These "Letters Requisitorial" generally concluded as follows:—

"Which doing you will promote justice and shew us a particular friendship, for which we shall at all times be gratefully indebted to you."

[1] *Warner* vs. *Mosses*, 50, L.J., Chap. 28; and *Finney* vs. *Beesley*, 17. Q.B., 86.

[2] 1 J., 139.

[3] *Cohen* vs. *Cohen*, 4 E.D.C., 40.

This Request, of course, was not compulsory, as were inter-territorial commissions to a local Judge. By way of parenthesis, for the system is analogous, I may here mention that the principles of the 74th Section of the English Bankruptcy Act of 1869 are not unlike the doctrine of the "Letters Requisitorial" of the Dutch law. By that section it is provided "that British Courts in the Colonies shall act in aid of and be auxiliary to each other in matters of bankruptcy,"[1] In the course of time in Holland, the Commissions, both within and beyond the territory, were sometimes issued, not to the local Judges, but to special Commissioners, and this principle we have adopted. But, even now, there is nothing to prevent any of our Judges from acting as Commissioners, either under a Commission from a foreign Court or from the Colonial Courts. Judges were formerly usually appointed as Commissioners to take evidence, either for want of any other competent person, or because no one else in the locality was known. But now-a-days, owing to the greater facility of communication, there is no difficulty in soon ascertaining the name of a person competent to act as Commissioner. But circumstances may still arise for one Court to send a request to another Court, in a foreign country, to have the evidence of certain witnesses there taken, either by that Court, or by a Commission to be appointed by such Court.

The Courts of Holland have from time immemorial acted upon Commissions sent to them from other countries to examine witnesses, and ordered their attendance for that purpose. This was done, not by virtue of any law, but by reason of the doctrine of the "comity of nations," first observed and practised in Holland, and afterwards gradually adopted in other countries; and this inherent right is also vested in our Supreme Court, which, upon petition, has the discretionary power to grant or withhold an order to compel the attendance of witnesses under a commission from another country.[2] But owing to the same power being doubted by

[1] See Chapter "*Process in Aid.*"

[2] Consult also Story's "Conflict of Laws," §§ 23 to 38; *Campbell* vs. *The Attorney-General*, L. R. 2 Ch., App. 571.

other Courts in other countries, and to make a universal rule applicable to all Colonies, the Imperial Parliament has from time to time passed several Acts, but the last two only, which are applicable also to all British Colonies, are sufficient to be mentioned here. The one is 19 and 20 Vict., Chap. 113, passed in July, 1856, by which, on an application to the Supreme Court, or to a Judge thereof, for an order for the examination of witnesses in this Colony in relation to any civil or commercial matter pending before foreign tribunals, the Court can grant such an order, and the witnesses are bound to obey it. Such an order can be granted now also in any *criminal* matter pending in a foreign tribunal. Thus, for instance, the Supreme Court granted such an order on a Commission from Germany for the examination of witnesses here against an Officer of a German man-of-war, in connection with supplies to the ship while here.[1] This application was founded on the 24th section of 33 & 34 Vict., Chap. 52, which is as follows :—

"The testimony of any witness may be obtained in relation to any *criminal* matter pending in any Court or tribunal in a foreign state in like manner as it may be obtained in relation to any civil matter under the Act of the Session of the 19th and 20th years of the reign of Her present Majesty, chapter 113, intituled 'An Act to provide for taking evidence in Her Majesty's Dominions in relation to civil and criminal matters pending before foreign tribunals'; and all the provisions of the Act shall be construed as if the term civil matter included a criminal matter and the term cause included a proceeding against a criminal: *provided that nothing in this section shall apply in the case of any criminal matter of a political character.*"[2]

But as the Act applies only to foreign Commissions, the Act 22 Vict., Chap. 20, was passed in 1859, by which the same power was given to the Supreme Court, throughout Her Majesty's dominions, to order a witness to appear and give his evidence before a Commissioner, in the Colonies, appointed by a competent Court in the United Kingdom. But it is to be observed that, while the jurisdiction of a Commissioner from the United Kingdom will be sufficient, without other proof,

[1] *Re Dregler*, B. for 1878, p. 101.

[2] See also the case of *Ex parte* the Imperial German Consul-General for South Africa, 11 C. T., 34.

to be acted upon, a foreign Commission must be accompanied by a

"certificate under the hand of the ambassador, minister, or other diplomatic agent of any foreign power, received as such by Her Majesty, or in case there be no such diplomatic agent, then of the consul-general or consul of any such foreign power at London, received and admitted as such by Her Majesty, that any matter in relation to which an application is made . . . is a civil or commercial matter pending before a Court or tribunal in the country of which he is the diplomatic agent or consul. . . . And that such Court or tribunal is desirous of obtaining the testimony of," etc. (here follow the names of the witnesses).

As the Privy Council has decided that Colonial Courts acting under Imperial Acts extending to the Colonies are bound by the decisions of the High Courts of England in the interpretation thereof, so we are bound by the decisions of the High Courts of England in the construction of these two Acts also; and it has been decided that it is for the Court compelling the attendance of the witnesses to determine what witnesses are to be examined, and what documents produced, and to decide questions of privilege.[1] In the case of *Hesslopp and another* vs. *Hamilton*,[2] a commission was issued from the Queen's Bench in England to a gentleman at Port Elizabeth in this Colony, requiring him to take the evidence of certain witnesses who were in Cape Town. The witnesses refused to attend voluntarily; whereupon an application was made to the Supreme Court, in terms of 22 Vict. Chap. 20, to compel the witnesses to attend before the Commissioner at Port Elizabeth. The order was granted, but it was left to the Chief Justice to fix the date of their appearance, as it was then not known when the Commissioner proposed to take the evidence. The Chief Justice, having subsequently been satisfied that the date fixed by the Commissioner allowed a reasonable time for the witnesses to attend, granted the order, on the 20th March, for their attendance at Port Elizabeth on the 8th April. Now, owing to the greater facility of communication between Cape Town and Port Elizabeth, the time would, of course, be shorter under a similar commission. In

[1] *Campbell* vs. *Attorney-General*, L. R., 2 Ch., App. 571.

[2] Decided in 1876, not reported.

the case of *Bowstead and another* vs. *Owners of Vessel "August" and another*, following the decision of the case just mentioned, an order was granted by Mr. Justice (now Sir John) Buchanan in chambers for the attendance of witnesses in Cape Town before the Commissioner here, appointed by the High Court of Justice in England.[1]

In the case of *Dunell, Ebden and Co.* vs. *Goldschmidt*,[2] our Supreme Court granted an order for the attendance of the witnesses before the Commissioner in Cape Town, who was appointed by a Commission from one of the High Courts in Germany, which commission was duly accompanied, as required by 19 and 20 Vict., Chap. 113, by a certificate from the German ambassador in London, which certificate, in turn, was also certified to by England's then Foreign Minister, so that there should be no doubt as to the genuineness of the Commission.[3]

But the Act covers only foreign Commissions from countries which have ambassadors or consuls in London, and where the Commissions have to come *viâ* London. There are many foreign places, however, which have no ambassadors or consuls in London; or a Commission may come from a country which would make it absurd to send it *viâ* London. In all such cases our Supreme Court, upon "request" from the Court from which the Commission issues, and upon being satisfied that the matter under investigation is a civil, and not a criminal, one, may exercise its discretion, under the common law, and give an order for the examination of the witnesses. By the law of Holland, this "request" should come from the Court, but owing to the disposition of the Court now-a-days to dispense with so many of the useless formalities and technicalities of the old practice, I dare say that if this "request" should be omitted, the Court here would grant relief upon the petition of the party, or his agent, who wants the witnesses examined.

The only object, after all, of an application to the Court is to enforce the attendance before the Commissioner of

[1] July, 1890, not reported.
[2] Decided 19th December, 1878, not reported.
[3] See also *Dregler*, B. for 1878, p. 101.

witnesses who will not come voluntarily. Whether the witnesses are to be examined by virtue of a foreign Commission, or of a Commission from the United Kingdom, or of a Commission from any of the Courts in this Colony, they are entitled in all respects to the same privileges, time, and remuneration, and are subject to the same disabilities, duties, and obligations as if they were duly subpœnaed to attend a trial pending before the Supreme Court.[1] The power of punishing the witnesses for contempt is vested in the Court which grants the Commission. All the Courts in this Colony, except the Magistrates' Courts, have the power to issue Commissions, but the Supreme Court only, or a Judge thereof, has the power to enforce the attendance of witnesses by virtue of foreign Commissions or Commissions from the United Kingdom, and under such Commissions the Supreme Court only can punish the witnesses for contempt. The Commissioner, no matter from what Court or tribunal the Commission has been issued, has no power to punish any witness for contempt, except an insolvent in an inquiry regarding his insolvent estate[2] nor can he compel the attendance of any witness.[3] The subpœnas for the attendance of the witnesses can be issued only out of the Court granting the Commission, and in the case of foreign Commissions or Commissions from the United Kingdom can be issued only out of the Supreme Court.

Instead of issuing the Commission to take the evidence generally, the Court may order certain interrogatories to be answered by the witnesses.[4] The latter is frequently done in England, but very rarely resorted to by us. With us the evidence is generally taken in the form of a narrative.

By the Magistrates' Courts no Commission of any kind can be granted, but interrogatories are issued, to be agreed upon by the parties and approved of or settled by the Magistrate.[5]

Usually there is no time fixed for the return of a Commission, but where a time is fixed, it must be returned within

[1] See Chapter "*Subpœnas.*"
[2] §§ 62, 63, and 64, Ins. Ord.; and *re Holtman*, 3 M., 302.
[3] See Chapter "*Subpœnas.*"
[4] Van Leeuwen, 5, 22-27.
[5] Act 20 of 1856, § 52.

that time, else it will lapse, unless before that time the Court, on good cause shewn, shall extend it.

Sometimes a Commission is general, but it may be specific; the Commissioner must see what are the terms imposed on him, or instructions given him, and abide by them.

A Commissioner need not take down the evidence in writing himself. He may get another to do it.[1]

The person who takes out the Commission must proceed and set the machinery in motion which shall give effect to the order. He must give notice thereof to the Commissioner and the opposite party and do all things requisite without undue delay.[2]

When the Commissioner has fixed the date for the parties to appear before him, he gives notice thereof to the party who obtained the Commission, and who in turn must give due notice to the opposite party.

The Commissioner can fix any room or office he pleases for taking the evidence, and such place shall be regarded as private and not public: and no one but the parties and their witnesses shall have the right to attend there.

A Commissioner, even though he may not be a J.P., has the right to administer the oath to all the witnesses.[3]

All the Resident Magistrates in this Colony are *ex-officio* Commissioners of the Supreme Court to examine witnesses.[4]

The appointment of Colonial Commissioners for the examination of witnesses is regulated by the 136th Rule of Court, and of Commissioners out of the Colony by the 274th Rule.

The costs of every Commission and of the evidence taken thereunder are in the discretion of the Court.

The Commissioner must decide upon the evidence offered, and confine himself as much as possible to the rules of evidence. All objections made should be noted by him, whether he decides on them or not. In case of a mistake, or

[1] *Bolton* vs. *Bolton*, 34 L.T., 123.
[2] See also *Prince* vs. *Adam and Zoer*, 4 C. T., 9.
[3] § 17 of Act 4 of 1861.
[4] Rule of Court 137.

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[1] *Bolton* vs. *Bolton*, 34 L.T., 123.
[2] See also *Prince* vs. *Adam and Zoer*, 4 C. T., 9.
[3] § 17 of Act 4 of 1861.
[4] Rule of Court 137.

as to whether what was done was rightly done or not, it is for the Court to determine at the trial.

The party who has applied for the Commission, whether plaintiff or defendant, and whether the Commission be joint or single, must lead evidence before the Commissioner.[1]

On the completion of the evidence the Commissioner must return the Commission, and send it with the evidence to the Court from which the Commission issued.[2]

Notice to opposite party of an application for a Commission "de bene esse."

(Heading of case.)

Sir,—Take notice that application will be made to this Honourable Court on the . . . . day of . . . . at . . . . o'clock on behalf of the above plaintiff for the appointment of a Commissioner of this Honourable Court to examine the plaintiff's witnesses at . . . .

Cape Town . . . . day of . . . .

Yours . . . .

. . . . . .

Plaintiff's Attorneys.

To C.D.
Defendant's Attorney.

(*Affidavit in support.*)

(Heading.)

I, A.B. of . . . ., the above plaintiff, make oath and say :—

1. That I am poor and cannot afford to pay for the expenses of my witnesses, who all reside in the district of . . . .

2. That the important legal questions involved in this case are my chief reasons for instituting the action in this Honourable Court instead of in the Circuit Court, but that even if the actions were instituted in the Circuit Court, the nearest Circuit town to the witnesses is . . . ., and for them to attend at Court would cost very much more than if they were to be examined at . . . . before a Commission of this Honourable Court.

Sworn at Cape Town
this, &c.

Notice of a Commission to examine a witness who is too ill to attend.

Follow the previous notice to end of the words "to examine," then add "Mrs. . . . . of . . . . who is too ill to attend the trial."

(*Affidavit in support.*)

I, A.B. of . . . ., make oath and say :—

1. That one of my witnesses in this case is Mrs. . . . . of . . . . but who is at present in such a delicate state of health as to make it unsafe

[1] *Bowstead & Co.* vs. *Owners of Vessel "August" and another*, decided in High Court of Justice, England, in July, 1890, not reported.

[2] Taylor on Evidence, § 471, *et seq.*

for her to travel in order to attend this trial as appears from the affidavit of Dr. . . . . filed in this application.

(*Note.*—If no affidavit from a doctor can be obtained, for whatever cause, then give the reasons or cause of the illness so as to satisfy the Court of the genuineness of the application, as for instance :—

That Mrs. . . . . has no medical attendant, and thus no affidavit from a medical practitioner could be obtained as to her inability to attend the trial, but I know of my own knowledge that she is in a deep consumption, is very weak, hardly able to move about without assistance, and that any attempt to travel would be attended with great danger.)

2. I say, lastly, that I cannot safely go to trial without her evidence.

Sworn at . . . .

this, &c.

(NOTE.—*The party may herself make the application and affidavit as to her illness, or old age, or as to whatever cause prevents him or her from attending the trial. See forms to "Subpœnas."*)

Affidavit when a witness is leaving the Colony.

1. That A.B. of . . . . is a material witness for me in this case but is at present a passenger on board the steamer . . . . from Natal to England, which steamer will sail from Table Bay for England this afternoon.

2. That I was not aware till to-day that the said A.B. contemplated going to England, and it was my intention as soon as the pleadings were closed to have applied to this Honourable Court for a Commission to take his evidence in Natal.

Sworn, &c.

Notice for a foreign Commission with points to be proved by the witnesses.

Sir,—Take notice that application will be made to this Honourable Court on the . . . . day of . . . . for the appointment of a Commissioner of this Honourable Court in London to examine the following witnesses of the defendants, viz.,

C.D. of . . . . to prove that the accounts annexed to the plea and referred to in paragraph 6 are correct.

E.F. of . . . . to prove that he was present on the . . . . of . . . . at . . . . where the plaintiff consented to forego the charges mentioned in paragraph 9 of the plea.

G.H. of . . . . to prove that he wrote and signed the letters referred to in paragraph 13 of the declaration and 17 of the plea, at the special request of the plaintiff.

Dated at Cape Town this . . . . day of . . . .

. . . . . .

Defendant's Attorneys.

To P.Q.
Plaintiff's Attorneys.

(*Affidavit in support.*)

I, A.B., of . . . ., the above defendant, make oath and say :—

1. That from information received from my London correspondent, who was specially asked by me to make enquiries as to the evidence that can be procured in England in support of my case, I am informed, and verily believe the information to be true, that paragraphs 6, 9, and 17 of my pleas can be proved by C.D. of . . . ., E.F. of . . . ., and G.H. of . . . ., all of whom were at one time in the service of the said plaintiff in this Colony.

2. I say, lastly, that their evidence is material to my defence and that I cannot safely go to trial without it.

Sworn at . . . . &c.

Petition for a Commission to examine witnesses in insolvency.

(Heading.)

The petition of . . . .

Humbly sheweth :—

1. That your petitioner is the trustee of the insolvent estate of . . . .

2. That in the course of his examination before the Master of this Honourable Court, the insolvent stated that he has had dealings and transactions with certain parties whom he named, but that he was unable satisfactorily to explain the whole of his dealings with them.

3. That it is necessary that the insolvent himself, and F. of . . . ., G. of . . . ., P. of . . . ., and R. of . . . . should be examined before a Commissioner appointed by this Honourable Court concerning the trade, dealings and estate of the said insolvent.

Wherefore your petitioner humbly prays that your Lordships may be pleased to appoint a Commissioner for the purpose of examining the insolvent himself, and F. of . . . ., P. of . . . ., and R. of . . . ., concerning the trade, dealings or estate of said insolvent.

And your petitioner, &c.

(*Affidavit of Verification.*)

Petition to compel witnesses here to give evidence under a Commission granted abroad.

(Heading.)

The petition of A.B. of . . . .

Humbly sheweth :—

1. That by the last mail from England your petitioner received instructions to act on behalf of the plaintiffs in this case, in obtaining the evidence of C.D. of . . . . and E.F. of . . . . in terms of the Commission hereto annexed, granted by the High Court of Justice in England, appointing W . . . . of this city . . . . as Commissioner to take their evidence.

2. That your petitioner duly called upon the said C.D. and E.F., and requested their attendance before the said Commission on the . . . . day of . . . ., and at the same time offering to pay them their necessary witness expenses, but they declined to attend, saying that they have been too badly treated by the said plaintiffs and that they would in no way assist them.

3. The Commission is returnable on the . . . . day of . . . ., and it is necessary that the evidence of the said parties should be taken in time; and the Commissioner has suggested . . . . the . . . . day of . . . . at 10 o'clock at his office in Cape Town as a convenient day and time for the witnesses to attend.

Wherefore your petitioner humbly prays that your Lordships may be pleased to grant an order, compelling the attendance of the said C.D. and E.F. before W . . . . the said Commissioner at Cape Town, on the . . . . day of . . . . then and there to give their evidence in the said cause.

And your petitioner, &c.

(*Affidavit of Verification.*)

(NOTE.—*Upon the granting of the order prayed for the witnesses can be subpœnaed to attend before the Commissioner.*)

CHAPTER XXIV.

ESPOUSALS, OR ENGAGEMENTS TO MARRY; AND BREACH OF PROMISE OF MARRIAGE.

AN espousal or a betrothal is an engagement or a mutual promise, entered into between two persons, male and female, who are capable of contracting and who are not within the prohibited degrees, to marry each other at a future period.

Espousals between persons who stand in the prohibited degrees of marriage are void *ab initio;* and so also is an espousal by one of two married persons to an unmarried party who is aware of the other's existing marriage, although the engagement be entered into upon the condition of marrying the other upon the death of his or her spouse. But if the party to whom the proposal is made is ignorant of the other's marriage, then, although the engagement would be void, that party may bring an action for damages for breach of promise.[1]

The prohibited degrees of engagement as well as of marriage are between all persons who stand in the position of ascendants and descendants to each other, *ad infinitum*, and collaterally to the end of the third degree.[2]

Persons who may never marry cannot be engaged to be married; for instance, all those who are incapable of procreation, and idiots or madmen.[3]

A person, either male or female, on attaining the age of seven years may, with consent of his or her parents or, in their absence, of legal guardians, enter into an engagement to

[1] Grotius, 1, 5, 2, and the references; also Van der Keessel, 62.

[2] See Chapter "*Marriage.*"

[3] See Chapter "*Marriage.*"

marry,[1] but he or she cannot marry, even with consent of parents or guardians, before the age of puberty, which is fourteen for males and twelve for females. If a person below the age of majority should become engaged without consent of the legal guardians, it is not binding, nor can even an action compel the fulfilment of such an engagement.[2]

Among the ancients children would either ask the parents to look out for spouses for them or the parents would indicate whom the children should marry; thus Abraham sent his servant to fetch a wife for his son Isaac and he *chose* Rebekah at the well, near the city of Nahor;[3] Judah *took* a wife for his son Er;[4] and Isaac said to his son Jacob, "go to . . . the house of Bethuel . . . and *take* thee a wife from thence";[5] Shechem said to his father Hamor, "*give* me this damsel to wife";[6] and Samson told his parents "to *get* her (a certain woman in Timnath) for me to wife";[7] the Priest of Midian *gave* Moses his daughter Zipporah.[8] Sometimes a king provided a wife for a favourite or minister; thus Pharaoh *gave* Asenath, the daughter of Potipherah, to Joseph.[9] Hermione declares that it was her father's business to provide a husband for her.[10]

In the later period of the Roman Republic it was customary for parents to betroth their young children to suitable partners, sometimes even without their knowledge; and though the children could not be compelled to marry, yet when in years of discretion they were made acquainted with their parents' choice many of them complied with it. Van Leeuwen also mentions an instance in the Dutch law: "Do you promise your daughter as a wife to my son?" "I promise her."[11] I know of several similar instances, even in this Colony, among leading families.

But our law requires that the consent of the intending spouses must be mutual and voluntary, and if either has been

[1] Cens. For. translated by Schreiner, I, I, 11.

[2] Utrecht, Con., Vol. 1, Cas. 52; Hol. Cons., Vol. 3, Con. 86; Loenius, 4 and 55; and *Gray* vs. *Rynhoud*, and *Greef* vs. *Verdeaux*, 1 M., 150 and 151.

[3] Gen. xxiv.

[4] Gen. xxviii. 6.

[5] Gen. xxviii. 2.

[6] Gen. xxxiv. 4.

[7] Judges xiv. 2.

[8] Exod. ii. 21.

[9] Gen. xli. 45.

[10] Euripides' Androm., 951.

[11] Cens. For. by Schreiner, I, 11, 1.

threatened or unduly influenced thereto, the engagement is void.[1]

In a speech made by Lord Hartington in 1889, in the north of England, he said that in almost every high and important political nomination, whether of an ambassador or a governor-general, a question invariably asked by those who have anything to say in the appointment is, "What sort of a wife has he?" thus showing that the wife's influence socially and politically has often been a factor in the selections made to high public offices.

Plato has somewhere said that in choosing a wife everyone ought to consult the interests of the State, and not his own pleasure. This doctrine is still kept up among some sovereigns at the present day, and only a few years ago the State interfered with the betrothal of one of the daughters of the late Emperor Frederick of Germany because, forsooth, it might have led to political complications. With regard to Royal marriages it may be noticed, in passing, that though the choice of partners is, in point of law, unrestricted, yet the usage and etiquette of Courts seems nevertheless to require that, in practice, the choice shall be confined within the pale of Royalty itself. Our law, however, leaves the choice of the betrothal and marriage entirely free, whether the parties are of the same or of different creeds or classes or nationalities.

Jacob Cats, the Dutch poet, in a long and amusing poem, has stated what sort of a wife he wanted. A few lines may not be uninteresting to some of my readers. He says:—

Niet al te soet, niet al te suur,
Niet al te sacht, niet al te stuur,
Niet al te schouw, niet al te bout,
Niet al te laf, niet al te sout,
Niet al te wys, niet al te gek,
Niet al te ryf, niet al te vrek,
Niet al te loen, niet al te gau,
Niet al te kloek, niet al te flau,
Niet al te ras, niet al te traagh,
Niet al te preuts, niet al te laag,

Niet al te scheef, niet al te fraai,
Niet al te mals, niet al te taay,
Niet al te heusch, niet al te plomp,
Niet al te teer, niet al te lomp,
Niet al te kort, niet al te lank,
Niet al te dik, niet al te rank,
Niet al te vast, niet al te broos,
Niet al te slecht, niet al te loos,
Niet al te kaal, niet al te bont,
Niet al te slim, niet al te ront,

[1] Brouwer, d. j., Con. 1, 17, 10.

Niet al te schaars, niet al te milt,
Niet al te tam, niet al te wilt,
Niet al te schraal, niet al te vet,
Niet al te vuyl, niet al te net,
Niet al te droef, niet al te bly,
Niet al te bloo, niet al te vry,
Niet al te glat, niet al te stram,
Niet al te rap, niet al te tam,
Niet al te loom, niet al te fel,
Niet al te traag, niet al te snel,
Niet al te mal, niet al te vroet,
Niet al te qaat, niet al te goet,
Niet al te slap, niet al te serp,
Niet al te bot, niet al te scherp.

* * * * *

Proposals from the most ancient days have generally come from the man. "And the sons of God saw that the daughters of men were fair, and they took them wives of *all of which they chose*."[1] I have no knowledge of universal history, so I cannot say whether the women have ever proposed marriage. There is, however, nothing in the law of any part of the civilised world to prevent their doing so. It is an absurd fashion only which fetters them. They have at the present day not even the advantages or opportunities which their two ancestors Eve and Rebekah had. The former "was *taken* to Adam" and the latter was *sent* to Isaac.[2]

The ladies, as the leaders and moulders of Society, and inventors of fashion, should resent and break through this fashion, and not be so selfish as to retain to themselves the privilege of saying "No" or "Yes," as the case may be. If one of them takes a fancy to a man whom she knows to be either too nervous and bashful to propose, or whom she knows from his position, whether through poverty or social inferiority or superiority, to be shirking proposal, why should she not make her feelings known to him, just as the man is allowed, nay even encouraged, by Society to make his feelings known to her? Many ladies have braved dangers and risked their lives for the sake of others or for the sake of common humanity, on battle-fields, in pestilences, and in hospitals. Many have also studied for and mastered all sorts of professions, and spoken from platforms in spite of tremendous opposition from all sorts of people of all classes, male and female, and from the most learned man to the biggest dunce. Many of them have also undertaken, sometimes even by marriage, to reclaim a rake or a drunkard or to mould a

[1] Gen. vi. 2.

[2] Gen. ii. 22, and xxiv. 59.

vagabond into something good; yet amidst all these trials and oppositions they have retained their good name and virtue without even a shadow of suspicion. Why, then, should they remain the slaves of fashion, when they have proved that they can do what man has done, especially when the question is purely a social one in which they have as much interest as, if not even a greater than, men? Many a man with a contempt for the female sex has through the influence of the ladies been brought to warmer and juster sentiments towards them, and has never thought of reproaching them for anything they have done under those circumstances or for perhaps accompanying and attending to the sick and wounded in the Red Cross Hospital Ambulances in times of war. It only requires half a dozen leading ladies of Society to set the example by proposing marriage and fearlessly proclaiming it to the world; others will soon follow suit, and, in so doing, "return their partner's lead."

Though the mutual promise implies a future marriage, there is nothing to prevent the parties marrying at once.[1]

Sometimes on the day of engagement a reason is given or it is apparent why the marriage cannot take place at once or shortly, or an arrangement is subsequently made deferring it to a later period. When a time has been fixed it must be abided by, and neither party can, without the consent of the other, alter it. Where no time for the marriage has been agreed upon on the day of the engagement or shortly thereafter, it must take place within a reasonable time; and if either party afterwards call for a fulfilment of the engagement, the other must give good reasons for the delay, and these must come within the limits of the original causes of deferring the marriage at the time of the betrothal or shortly after.

But this future period is not for ever to remain in uncertainty; it must be within a reasonable time; and what this is depends upon and varies according to the circumstances of each particular engagement. The Court must be satisfied, either from the position of the parties, or from the nature and period of their engagement, that a reasonable time has elapsed

[1] Hol. Con., Vol. 5, Con. 147.

for the fulfilment of the promise. Thus, a student, while he is *bonâ fide* qualifying himself for his chosen profession, can plead delay till he has passed the necessary examinations and been admitted, if he was studying for the profession at the time of the engagement and the girl knew of it. Also a man without means, but who is honestly endeavouring to earn sufficient to support himself and a wife, can reasonably plead delay. So also can a man temporarily absent on the service of the State, and uncertain of the date of his return; or one who is so situated that, through no fault of his own, he is for the time being unable to fulfil his promise; or a soldier or sailor on special service, or one who is held in captivity.

If the excuses offered are not satisfactory, or the delay to marry is unreasonable, the innocent party can break off the engagement forthwith.[1]

An espousal does not require any particular form of words or solemnity to make it binding, and it may be entered into either verbally or in writing or in any other way. The *essential requirement of the law is the mutual agreement of the parties*, and this may be expressed either in person or by letter or by conduct or by means of others (for instance, by procuration), or by a third party especially authorised thereto, which is frequently done among illustrious persons. Thus Abraham sent his servant to ask a wife for his son Isaac and he chose Rebekah.[2]

An engagement entered into through fraud by either party is void *ab initio*.

Also, if one of the parties were to say to the other, "As long as I live I shall not desert you," it is no promise of marriage, although concubinage may have followed, because this may be interpreted to mean nothing more than a general support.[3]

"I marry you," or "I give you my pledge," is no promise of marriage; because the words are said in the present, whereas an offer or a promise or a contract to marry should

[1] Hol. Con., Vol. 4, Con. 368; and Bellum Juridicum, Cas. 34.

[2] Gen. xxiv. 4, 47, 51–67.

[3] Hol. Con., Vol. 3, Con. 54; and Huber Hed. Regts., Bk. 1, Chap. 5, n. 6.

be in the future tense; therefore, "I shall marry you," or "I promise to marry you," is binding.[1]

Sleeping together is no proof of promise of marriage;[2] nor any presents given by the one to the other;[3] nor kissing each other.[4]

An illegal, an immoral, or an impossible condition is not binding; nor is an indecent or a disgraceful or scandalous condition.[5]

A man, we will suppose, asks a woman to be his wife. She answers, "Ask my father—his answer shall be my answer." He asks the father, who says "Yes," though she thought he would say "No." This is not binding on her, on the ground that there was no mutual agreement, as she thought that the father would say "No;" more especially if she could give satisfactory reasons why she thought he would say "No." But if she had simply left the decision entirely and unreservedly in the hands of her father, to be guided by his answer, and by some word, act, or deed had afterwards ratified his answer, that would be binding on her.

"When shall you and I stand like that?" a man may say to a woman, pointing to a bride and bridegroom before the altar. She answers "Whenever you like." In themselves this question and answer are not binding on either party, but, coupled with the conduct of the parties either before or subsequently, they may be held binding. I know of several marriages where people have traced their betrothals to similar questions and answers, which, though at first were out of idle gossip or fun, were afterwards regarded by the parties as serious.

So also such questions as these, "When shall we follow suit?" or "When shall you and I do likewise?" or "Would you like to be nearer related to my family?" or "Will you come and share my house with me?" are in the abstract not proposals of marriage, but, coupled with conduct or the nature of correspondence, before or since, may be regarded in that light.

[1] Hol. Con., Vol. 1, Con. 318, and Vol. 2, Con. 219; Loenius, 43.
[2] Hol. Con., Vol. 3, Con. 90, n. 14.
[3] Hol. Con., Vol. 4, Con. 105, and Vol. 5, Con. 218.
[4] Loenius, 14.
[5] Hol. Con., Vol. 5, Con. 106; Van der Keessel, 47 and 48.

Many young people between whom there was an "understanding," or who were on a fair way to betrothal, would have become engaged but for the undue haste of relatives or friends to chaff or tease them about it. The result has often been that by way of denial or exculpation one party has unnecessarily and unintentionally made disparaging remarks of the other, as a reason or excuse why he or she would never think of marrying the other. These again, in turn, have led to coolness in some families, and even to actions for slander. But apart from the iniquitous habit of this premature teasing, it has often been the cause of a young man suddenly ceasing to meet the lady anywhere, or to visit at her parents' house as before, even by invitation, and thus has caused unnecessary surprise and pain to the parents as well as to the young lady.

The contract of engagement must be in earnest, and must be so clear that no other construction can be put upon the meaning of the parties from any expression used by either towards the other than that of a promise of marriage.[1]

"I promise to marry you," is binding, and if this is accepted is perfectly valid; so also "I shall marry you."[2]

An ante-nuptial contract entered into by the parties is proof of the engagement to marry.[3]

A promise made by the one party, while drunk, to the other, is binding, as drunkenness is no excuse, unless the party succeeds in proving that his or her drunkenness at the time of the proposal amounted to insanity or complete loss of reason.[4]

A promise of marriage may be made conditionally, and is binding providing it is reasonable; for instance, "I accept your proposal on condition that you pass a creditable law examination at the next University Examinations."[5]

A young attorney who was in the habit of concluding or winding up his love-letters with the hackneyed old legal phrase "yours, without prejudice," was sued by the lady for breach of promise of marriage, and defended the action on

[1] Hol. Con., Vol. 3, Con. 90, n. 5 and 35; Dig. 23, 1, 4 and 13.
[2] Hol. Con., Vol. 3, Cons. 7, 41 and 42, and Vol. 1, Con. 318.
[3] Van Alphen, Vol. 2, p. 552.
[4] Loenius, 46; Brouwer, de J., Cons. 1, 4, 11 and 12.
[5] Cens. For., 1, 1, 4.

the ground of the precautionary words here used, which he said protected him from any action of the kind. But the Court (this happened in England in 1886) very properly told him that he had wholly misapplied and misunderstood the meaning of the words, and condemned him in damages.

So long as a proposal has not been accepted, the maker may recall it and the opposite party can take no action thereon. But from the moment it has been accepted, although by a minor accepting that of a major, the latter is bound and cannot withdraw on the ground that the other was a minor and had not the consent of his or her guardian. Of course if the minor made or accepted a proposal without the consent of the guardian, it is not binding on him or her, but the major is nevertheless bound whether it is pleasing to his or her parents or not. If the minor had the consent of the guardian, then he or she is as much bound as the major. If the minor had not the consent of the guardian and does not recall the engagement before or on becoming of the age of majority, the engagement would be regarded as continuing and binding.[1]

Prof. Van der Keessel says[2] that "of two espousals, whether absolute or conditional, the *prior one should have preference*, unless the latter has been confirmed by marriage celebrated in due form." I can find no confirmation of this doctrine. He cites no authority whatever. The nearest approach to Van der Keessel's view that I can find is the 92nd Case in Loenius's decisions. Loenius also cites no authority. Probably it was a decision on some purely local custom of one of the small States before the union of the various Provinces of Holland. The case is an isolated one and not referred to by any of the writers. Anyhow, it and V. de Keessel's assertions are against the general principles of the law on the subject, and there is nothing to prevent a person being engaged to two, or three, or a dozen people at a time, and to make his or her choice which one of the dozen he or she will marry, taking the chance of suits of action for breach of promise being brought by the other eleven.

[1] Hol. Con., Vol. 3, Cons. 86, 90; Utrecht, Cons., Vol. 1, Con. 52. Huber, Heds. Regts., 1, 5, 15;

[2] Thes. 58.

From the most ancient period it was customary for the engaged parties to make presents to each other; sometimes their relatives also made them presents. Thus Abraham's servant gave "jewels of silver and jewels of gold and raiment," to Rebekah;[1] and so also Shechem offered, if he might but have Dinah for his wife, any dowry that should be demanded for her and any gift to her relatives.[2]

In certain cases, when the intended husband was unable to give the customary presents, service of some kind was substituted; as when Jacob served fourteen years for Rachel.[3] Or some other act was demanded by the father of the girl.[4]

Occasionally a father endowed his daughter; thus Caleb gave Achsah certain springs;[5] and Pharaoh gave the city Gezer to his daughter, Solomon's wife.[6]

In the Roman period an *arrha* or earnest (Dutch, *Godspenningen*) was given by one party to the other, by way of pledge of good faith to abide by the engagement. At the present day rings are exchanged. But it never was, nor is it now the law, that any pledge or present or dowry should, as a matter of course, be given on an engagement. It was, and is, customary and complimentary, but not obligatory, and I know of many instances where it was part of the engagement by one or other of the parties not to give or to accept any engagement or wedding ring.

An engagement by letter is of course easy of proof by the production of the letter, and an engagement by proxy is also easily ascertained by proving the authority to enter into the engagement, and even an engagement verbally made is sometimes not difficult of proof, for this, like other agreements, must be verified by the ordinary and usual mode and kind of proof.

Some engagements by means of correspondence cannot be gathered from any one particular letter or single passage in a letter, but they may be from a series of letters. It frequently happens that if one takes one letter, or, say, every third or fourth letter from a packet, there will not be found

[1] Gen. xxiv. 22, 30, 47, 53.
[2] Gen. xxxiv. 12.
[3] Gen. xxix. 18–20, 27, 30.
[4] 1 Sam. xviii. 25–27.
[5] Josh. xv. 16–19; Judges i. 12–15.
[6] 1 Kings ix. 16.

sufficient *primâ facie* evidence of an engagement; but if one reads all the correspondence between the parties, and gets the doubtful phrases or mysterious expressions (known only to lovers) or allusions therein explained, one has strong proof of an engagement. If then the party who asserts the engagement gives a reasonable account of his or her version of the correspondence, and satisfactorily explains the doubtful allusions, and that such mysterious language as is used by both or either of them was understood by them in the sense he or she now takes, a *primâ facie* engagement can reasonably be assumed, unless, indeed, the other side can succeed in disproving the meaning assigned by the plaintiff, and gives a satisfactory account of his or her correspondence, and that the language or expressions used are capable of a wholly different interpretation from that put on them by the plaintiff, and withal a consistent one.

Again, there are instances where the letters by themselves, though taken as a whole, prove no *primâ facie* engagement, yet when coupled with conversations of the parties, or with what one or other of them has said to someone else, and with their general conduct, combine to prove an engagement.

It is a rule of law that a *betrothal may be made in any way*, and though frequently there is a question and an answer, these are not absolutely necessary. "The subject of marriage is broached, and virgins promise themselves away for the most part in some retired nook, far from spectators."[1]

Where there is a question and an answer, the Court must judge of them. Yet there are many engagements where there has been a question or a proposal of marriage, but no direct answer given of either *yes* or *no*. Hence the common expression, frequently heard in this connection at five o'clock tea-tables, that "Silence gives consent." But nothing can be more erroneous than seriously to assume any such thing. A woman may be thunderstruck at the audacity of a man to dare to propose to her, and she may simply look at him, either in bewilderment or surprise, and not say a word. To construe this silence into consent is absurd. Or she may give him such a stare or withering look, without saying a

[1] Cens. For., 1, 2, § 8.

word, as to be tantamount to the most emphatic *no* that can ever be uttered. Or, to take another instance, she may simply ignore his question, whether from callousness, indifference, inexperience, youth, shame, bashfulness, or for quiet's or peace' sake, not wishing to commit herself, or from whatever other reason or cause she may have. Such silence cannot be construed into consent. But when her silence is coupled with an *overt* act, that is, by open assertions, acts or conduct generally, going to shew that she favourably entertains the man's attention to her, then such conduct must be construed in favour of the man's intentions and into an acceptance of his proposal. To illustrate this principle I give two examples, one for, and the other against, "silence" being regarded as "consent;" and, if they are somewhat long, I must beg indulgence on the score that for the practical object in view I should find it hard to curtail them:—

"A lady whose father was in gaol for debt endeavoured by every means to liberate him, but failed. A young man who had previously unsuccessfully wooed her thought now was his chance, and he called upon her. He said he had heard of her father's misfortune, and had come to sympathise with her. Anyhow, after a long conversation, during which she repeatedly cried, she appealed to him for assistance. He answered, 'Yes, if you will consent to be my wife.' She blushed, dropped her head, but gave no response. He then took her hand and repeated his question, at the same time putting his arm round her neck, to which she made a show of resistance, and he gave her a kiss, which she also feignedly tried to resist, but did not speak. After a pause, she asked him, 'Will you really pay my father's debt?' He answered, 'Yes, upon my word of honour, and to-morrow morning at 9 o'clock he shall be a free man.' 'Oh, how good of you,' she exclaimed; 'thank you so very much, we shall all be very grateful to you.' She then kissed him, and at the same time releasing herself from his hold, went away, saying, 'Let me go now and tell the family;' which he took to mean, to tell them of their engagement. The next morning the debt was paid by him, and the father was released from imprisonment. The young man repeated his visits every day for several days, but never saw the young lady alone, who always avoided a private interview, though she was more friendly to him than formerly. He then told her father of his engagement to her, and on her denying it he narrated the occurrences above mentioned. She, in her defence or as her excuse, admitted what had passed between them, but explained that before the occurrence of these facts he had paid her marked attentions which she never returned; that she was in great distress at her father's incarceration, and felt that, when the man made the offer to pay the debt and attempted to kiss her, if she wholly resisted

the kiss he might withdraw that offer; for the same reason she did not forcibly resist his putting his arm round her neck, and that on being for the second time assured that he would pay the debt, she out of gratitude thanked and kissed him; that when she said she would 'tell the family,' she meant what she in fact did, viz., to tell them of the prospect of her father's release the next morning and by whom, but she never mentioned a word to a soul about the proposal, nor would she ever have said a word about it, till he broached the subject to her father; that her whole conduct, before as well as since the proposal, was one of avoidance and that the family knew she did not care to meet him alone; and that the only occasion of their meeting alone was the one here mentioned, which was in her father's interest."

Surely no engagement can be inferred from this; and such conduct of a young lady so situated is perfectly consistent with the facts of her denial of an engagement, and excusable under the circumstances, as only those who have been in great distress, want, trouble, and trial, can, with a perfectly clear conscience and with a due regard of the utmost sense of propriety, testify.

Now as to the other example:—

On a lady admitting the proposal, but denying the promise, of marriage, the young man, who was very nervous and bashful, sought advice. He could produce no letters and had no witnesses, and when asked by his legal adviser to give a true and full statement, such as he could swear to in Court, of all the facts upon which he founded the lady's promise of marriage, he did so as follows, in a stuttering, blushing, and a serio-comic way:—

"Miss —— and I, after promenading about the garden, as we frequently did, resolved to return to the reading-room to see the morning paper. I had been endeavouring all the morning to propose to her, but could not summon courage. On the pretence of reading the latest European telegrams together, I somewhat abruptly said, 'Will you be my wife?' She dropped the paper, looked down, blushed, turned round, and moved slowly off as if to leave the room. I said 'Miss ——, don't go away, you might at least say good-bye before you go,' and at the same time I advanced up to her gently and tremblingly took hold of her right hand. She did not withdraw it; I felt her hand trembling in mine; my knees began to tremble also and knocked together; I felt as if I was going to sink in my boots; at the same time I felt also a choking sensation in my throat; and for a few seconds there we both stood as if dumbstruck and pinned to the ground. But, beginning to dread that someone might come into the room to put it in order before the usual time, I

gently tried to face her. Her head was lowered, and her face covered with blushes. I had still hold of her hand, and where I mustered courage from I don't know, but I felt I grew a little familiar, and for the first time called her by her name and stuttered, 'Oh Lily,' and then I felt as if I was choking. I coughed, I verily believed, from the choky sensation, upon which she turned round and looked me in the face, and I gazed nervously and tenderly into her eyes. She blushed all the more, and then gently dropped her head on my shoulder, and closed her eyes. I put one arm, for the first time in my life, round her waist, while still holding her hand in mine. She made no resistance, and I then stole or imprinted a kiss, also my first kiss, gently on her forehead. Again she made no resistance. I then drew her nearer to me, and held her somewhat more tightly round the waist, just as one would do when about going in for a wild waltz. Again no resistance. She then opened her eyes, looked up to my face, put her free arm timidly round my neck, blushed more than ever, and whispered 'Jack,' the first time she ever called me by that name. I then kissed her two or three times on her lips and received a kiss in return, and then we stood for a few seconds hugging and kissing each other till her breakfast bell rang, and then—I felt that she meant *yes*."

Now suppose this occurrence was afterwards denied by Lily as an acceptance of the proposal, it would be for Jack to prove it at the trial, coupled with the further proof that his visits and attentions had always been favourably received by the lady and of their frequent meetings and walks together alone; and it would be for Lily to explain her conduct, why she went beyond the usual bounds of modesty and propriety allowed by society to those only who are accepting proposals of marriage, or who are engaged to be married; and if she failed to satisfy the Court, she would be held by her behaviour to have accepted the proposal.

But the most difficult kind of engagement to prove is that in which there has been no proposal made or question asked, and of course no answer given, but somehow or other the parties find themselves engaged to be married, or in that position of mutual confidence tantamount to an engagement, from which neither of them can morally and honourably withdraw, and they do not know from when it dates. This kind of engagement is what some young ladies call an "understanding;" and it is this "understanding," which the parties themselves often do not understand, that the Court is asked to interpret.

To arrive at this "understanding" between the parties, its origin has often to be traced far back, and a great variety of little incidents have to be put together, and the conditions and circumstances of life, and ways, habits, and education or ignorance of the parties, have also to be considered. Many of these "understandings" have their origin in various causes, but most frequently, though it may seem incredible, arise from condolence at interviews at the loss of a valued friend or relative, in speaking of his or her good and many virtues, and each bringing to the notice of the other some favoured expression or good quality of the departed; or from consolations offered at the disappointment of a broken-off match, especially when it is at the same time announced that the breaker-off is engaged to be married to another, and then in running him down together and calling him by all the ugly names contained in the dictionary; or from sympathy at the disappointments, losses, misfortunes, troubles, trials, or illness of another; or even from regret or sorrow at the persecution one receives at the hands of another. Or sometimes it may be for a very ridiculous reason. Thus it was said of Hall, the preacher, that he offered his hand to his maidservant the first time he saw her, because she put coals on the fire precisely as he would have done himself! And there is a story of another gentleman that he chose a lady for his wife because he liked her way of eating cheese!

But whatever its cause or origin, the Court has to decide whether, from all the circumstances concerning the parties as disclosed at the trial when fitly pieced together, an engagement to marry each other can be presumed.

In the enquiry on this point every incident going to prove this agreement must be taken into consideration. Little isolated acts, hints, looks, signs or gestures, or expressions dropped now and then by either party, and all the other little mysticisms which lovers know how to indulge in, when dissociated from the idea of an engagement, may be perfectly natural and innocent in themselves, but when put together and taken as one united whole, may go far to strengthen, if not to prove, the plaintiff's case. All the circumstances of the alleged engagement, and the conduct of the parties, their acts

and behaviour towards each other in public, and everything written or said by either of them to each other, or to anybody else, about the engagement, must be taken into consideration.[1] The general behaviour may be such as to justify the remark of a fussy, meddlesome and disappointed old maiden aunt, whenever she thinks, from the conduct of the parties, that they must be engaged, but hears it denied—"If you hain't engaged you hought to be," meaning thereby that if a man's intentions be honourable to a virtuous woman, he should not pay her unusual and conspicuous attentions to the neglect, or regardless of the presence, of other ladies: otherwise the conclusion is that he is wooing her; and if she reciprocates such attentions, the inference is that there is an "understanding," or an implied engagement, which they may as well formally announce to the public.

Frequent visits to the house of the lady, seeing her alone, and being otherwise frequently seen in her company; going out together for walks, drives or rides; withdrawing themselves at parties, dinners or games to secluded or isolated spots; their behaviour in a ball-room by noticing each other as if they were each other's exclusive property or had come to enjoy themselves only and not to consider others; presents given to each other; kissing and winks or signs which they do not wish others to know of; carrying out each other's wishes or desires as to accepting or declining invitations or as to dress; the gentleman visiting other families less frequently than formerly, and being in consequence seen more at the lady's house than usual, and also frequenting his club less during his spare hours; more frequently going with the lady to her church and less to his own; constantly paying her in other ways unusual and marked attentions wherever she may be, which, if she does not openly reciprocate, she certainly does not avoid—all these little acts, incidents and occurrences, when put together, go far to prove the intention, or leaning, of the parties, and if either of them asserts an engagement and proves the greater part of such events, it will be for the defendant to disprove them. It is, however, easy to deny an

[1] Hol. Con., Vol. 5, Con. 84.

engagement, but the bare denial, even on oath, will then not count for much. Satisfactory proof must be given why these liberties or attentions were indulged in or tolerated; why the exclusiveness or isolation at public places; and why the kisses and the presents and all the other little occurrences here mentioned. Of course such conduct may be capable of explanation, but the explanation must be satisfactory, and such as any reasonable man or the Court can accept as being consistent with the probabilities thereof. The best guides in such a matter, for a Court or for a jury, are common sense and a knowledge of human nature.

An espousal may be dissolved by mutual consent; but besides this, either party may dissolve it, even against the wish of the other, upon just grounds, of which the following are the chief[1]:—(*a*) In a conditional engagement, if the condition has not been fulfilled by the time or on the event agreed upon. (*b*) For criminal conduct of either party, before or after the engagement. For instance, if after the engagement either party discovers that the other is leading, or has formerly led, an unchaste life; but if it were known at the time of the engagement, then he or she would be liable to an action on refusal to complete the marriage.[2] (*c*) If either party leads, or has led, a dishonest life, or if the man finds out that the woman whom he thought to be innocent was not a virgin; for in a promise to marry chastity and modesty are tacit conditions.[3] (*d*) Adultery committed by either party. (*e*) If either party has been convicted of a crime, and the other did not know of it at the time of the engagement. (*f*) If after the engagement either party leads a drunken, dissipated, or profligate career.[4] (*g*) If during the engagement a discreditable event should occur in the family of either; for instance, if any member is punished criminally, or if the mother of either is confined of an illegitimate child. (*h*) Theft committed by either party.[5] (*i*) If either is deeply involved in debt.[6] (*j*) If either party

[1] Loenius, 43.
[2] Hol. Con., Vol. 3, Con. 90, n. 15; Van Alphen, Vol. 1, p. 4.
[3] Hol. Con., Vol. 4, Con. 283, and Vol. 6, 2nd pt., n. 107, and Cens. For., 1, 1, 28 and 29.
[4] Loenius, 14.
[5] Loenius, 14.
[6] Van Leeuwen, 4, 25, § 5; Utrecht Con., Vol. 2, Con. 104.

becomes bankrupt or insolvent.[1] (*k*) If any fraud has been practised by either party upon the other as an inducement to the marriage, either as to property or as to social position; for instance, if false representations are made as to the wealth and amount of fortune, &c., and if either gives himself or herself out to have a certain trade or profession or calling, it is afterwards discovered not to be so.[2] (*l*) If after the engagement either party secretly parts with his or her property or wealth, which property or wealth may have been an inducement towards the engagement. (*m*) If either party behaves brutally or uses great violence towards the other, after the engagement; for it may be conjectured that this will be repeated after marriage. (*n*) Impotency or incapability of either party to procreate. (*o*) If during the engagement either party becomes blind or deaf, perpetually maimed or disfigured. (*p*) If either becomes deformed; for instance, by the loss of nose or lips.[3] (*q*) If either party, having engaged to bring a certain sum of money into the marriage, fails to do so. (*r*) If either party has changed his or her religion since the engagement, or if either was led to believe the other to be of a certain religion, but subsequently finds out it is not so. (*s*) If either party becomes a monk, a nun, or a member of the cloisters. (*t*) By becoming a spendthrift. (*u*) Insanity of either party. (*v*) If the parents of either party promise to settle a dowry, and fail to do so.[4] (*w*) Perpetual or incurable bodily disease of either party.[5] (*x*) By prescription; for instance, if either party, without good grounds to justify the delay hereinbefore mentioned, remains quiet or fails to carry out his or her promise during two years, and when called upon to fulfil the same, fails to do so without sufficient cause.[6] (*y*) Long and unknown absence for three years.[7] (*z*) Bigamy committed by either party.

If a woman has been forcibly seduced against her will it is no cause for breaking off the engagement.

[1] Loenius, 14.

[2] Hol. Con., Vol. 2, Con. 104, n. 2 and 3; Utrecht, Con., Vol. 2, Con. 104; and Cens. For., 1, 1, §§ 28 and 31.

[3] Van Leeuwen, p. 432, § 7; Huber, Hed. Regts., Vol. 1, p. 42, n. 12, and Cens. For., 1, 1, 30.

[4] Van der Keessel, 69.

[5] Huber, Hed. Regts., Bk. 1, Chap. 6, § 12.

[6] Van Leeuwen, 4, 25, § 8; and Dig. 23, 1, 17; C. 5, 1, 2.

[7] Cod. 5, 17, 2.

If then either party breaks off the engagement without any lawful cause, he or she may by the law of Holland, and so formerly also with us, be compelled either to marry the other, or to pay damages for breach of promise. The choice was at the option of the innocent party, and if he or she chose to sue for a fulfilment of the marriage, and the order was given (as indeed the Court could not withhold it), and the defendant declined to marry after this order, he or she could be civilly imprisoned till the order was complied with.[1] There are several cases, decided in this Colony, where the reluctant party has been ordered to marry the other *in foro ecclesiae*, within a time fixed by the Court.[2] But though the Court could order the marriage, they could not compel the parties afterwards to live together as husband and wife. Accordingly, one young man who was imprisoned for failing to marry the girl he had promised to, finding that he could be detained in prison all his life unless he complied with the order, offered to marry the girl forthwith in the Lutheran Church in Strand Street, Cape Town, of which church both were members. The girl was apprised of this and consented, and forthwith both went to the church, he in charge of a policeman who had to see that the order was carried out and with instructions, if he did not marry her, to take him back to gaol. The parties were duly married and the register was signed, when he took his hat and hurriedly walked out at the vestry door, leaving the girl in surprise and embarrassment to go out at the main door, without explaining his conduct. He had complied with the Court's order, and could not be re-arrested!

Owing to a large number of emigrants from England, and their children, born here, being compelled in former years to marry Colonial-born women or men to whom they became engaged to be married, a representation was made to the Home Government, by some of the more influential emigrants, of the hardship and iniquity of a law which compelled a marriage, not only between the emigrants and Colonists, but among the Colonists themselves, where either of the betrothed

[1] Placaat of 18th March, 1656, art. 22.

[2] *Jooste* vs. *Grobbelaar; Richter* vs. *Wagenaar*, 1 M., pp. 149 and 262.

parties had ceased to desire to marry the other; and particularly was the feeling high on both sides—the emigrants and the Colonists—at the time when certain prejudices were still very great. Accordingly, by an order in Council, the Home Government passed a law of the 7th September, 1838, now called the Marriage Ordinance, by the 19th section of which the action for compelling the marriage was abolished. By the 20th section a remedy was given to the aggrieved party to institute an action for breach of promise of marriage. But this was unnecessary, as he or she could do so under the common law. In the case of *Mocke* vs. *Fourie*,[1] the Chief Justice said :—

"The law makes no distinction between the case of a man suing for breach of promise of marriage and a woman suing for breach of promise of marriage. In either case damages are recoverable."

Servius Sulpicius Rufus, who died B.C. 42, mentions that even in his time the action for breach of promise of marriage was in force.

If either party has married another person, then it becomes impossible to fulfil his or her engagement, and the disappointed party may at once commence an action for breach of promise; so also may either of them from the moment the other has positively refused to carry out his or her promise or from the moment there is sufficient evidence that he or she does not intend to carry out such promise.

The action for damages for breach of promise of marriage is for compensation for loss of comfort or social position, or, as some writers put it, for the value of the match to the person disappointed; and the amount to be awarded is entirely in the discretion of the Court, who must be guided by the circumstances of each case, the social position of the parties, and the pecuniary means of the offender. But besides this general compensation, the disappointed party may, in addition, recover the amount of any actual expense he or she may have been put to in making the necessary arrangements or preparations for the marriage, according to the position of the parties; also if either party has given up a trade or

[1] 3 C. T., 313.

situation, in anticipation of the marriage; or if the lady has received an offer of marriage from another gentleman, but refused it in consequence of her prior engagement; or if either party has gone to or come from one place to another in order to be married, and has to return in consequence of the refusal of the other party to marry, and thereby incurred certain expenses. All these are causes which entitle the plaintiff to claim, and for which the Court may award, special damages. Though not absolutely necessary, it will assist the Court towards awarding damages, if the defendant's pecuniary means can be proved at the trial.

Whatever either party has given to the other during the engagement must be returned if the marriage does not take place; so also if either party dies before the marriage can take place, whatever is given must be restored to the other or to his or her heirs, as all such donations are presumed to be made in contemplation of the marriage.[1]

The following extract from a speech of Lord Erskine, one of the most eloquent forensic orators of his day, seems a suitable close for this Chapter. It was in an action in 1780, by Mrs. Morton, a widow, against Fenn, a widower, for damages for breach of promise. Both parties were old and ugly. The jury had awarded the plaintiff £2,000. This sum the defendant thought excessive, and moved the Court to have the verdict set aside. Erskine, for the lady, opposed, and was successful:—

"The jurisdiction of the Court in cases of excessive damages stands upon so sensible and so clear a principle that the bare stating of it must, in itself, be an answer to the rule for a new trial. . . . But there is a catalogue of wrongs over which juries, where neither favour nor corruption can be alleged against them, ought to have an uncontrolled dominion, not because the Court has not the same superintending jurisdiction in these as in other cases, but because it can rarely have any standard by which to correct the error of the verdict. There are other rights which society is instituted to protect as well as the right of property, which are much more valuable than property, and for the deprivation of which no adequate compensation in money can be made. What Court, for instance, shall say in an action for slandering an honest and virtuous character, that a jury has overrated the wrong which honour and sensibility endure at the very shadow of reproach? If a wife is seduced

[1] Grotius, 3, 2, 20, and references.

by the adulterer from her husband or a daughter from the protection of her father, can the Court say this or that sum of money is too much for villainy to pay or for misery to receive? In neither of these instances can the jury compel the defendant to make an adequate atonement, for neither honour nor happiness can be estimated in gold, and the law has only recourse to pecuniary compensation from the want of power to make the sufferer any other. These principles apply in a strong degree to the case before the Court. It is, indeed, a suit for breach of contract, but not for a *pecuniary* contract; injury to *property* is an ingredient, but not the *sole* ingredient of the action. There is much personal wrong, and of a sort that is irreparable. There is, upon the evidence reported by your Lordship, loss of health, loss of happiness, loss of protection from relations and friends, loss of honour which had been before maintained (in itself the full measure of ruin to a woman), and added to all these there is a loss of property in the disappointment of a permanent settlement for life, and for all this the jury have given two thousand pounds, not more than a year's interest of the defendant's property . . . . The plaintiff appears to be the daughter of a clergyman, and to have been bred up with notions of a gentlewoman; she had been before respectably married, in which condition and during her widowhood she had preserved her character, and had been protected and respected by her relations and friends. It is probable that her circumstances were very low, from the character in which she was introduced to the defendant, who being an old and infirm man was desirous of some elderly person as a housekeeper, and no imputation can justly be cast upon the plaintiff for consenting to such an introduction, for by Mr. Wallace's favour (the Counsel for the defendant) the jury had a view of the defendant, and the very sight of him rebutted every suspicion that could possibly fall upon a woman of age, constitution, or complexion. . . . The age of the plaintiff, who is a woman towards fifty, was another topic, so that a crime is argued to be *less* in proportion as the temptation to commit it is *diminished*. It would be in the defendant's favour if the promise had been improvident and thoughtless, suddenly given and as suddenly repented, but the very reverse is in evidence, as she lived with him on these terms for several months, and at the end of them he repeated his promises, and expressed the fullest approbation of her conduct. It is further in proof that she fell into bad health on discovering the imposition practised on her, and his disposition to abandon her. He himself admitted her vexation on that account to be the cause of her illness, and his behaviour under that impression was base; having determined to get rid of her, he smuggled her out of his own house to her sister's under pretence that change of air would recover her, and continued to amuse the poor creature with fresh promises and protestations, till, without provocation, and without notice or apology, he married another woman young enough to be his daughter, and who, I hope, will manifest her affection by furnishing him with a pair of *horns* sufficient to defend himself against the Sheriff when he comes to levy the money upon this verdict. By this marriage the poor woman is abandoned to poverty and

disgrace, cut off from the society of her relations and friends, and shut out from every prospect of future settlement in life suitable to her education and her birth; for having neither beauty nor youth to recommend her, she could have no pretensions but in that good conduct and discretion which, by trusting to the honour of the defendant, she has forfeited and lost. On all these circumstances, no doubt, the jury calculated the damages, and how can your Lordship unravel or impeach the calculation? They are not like the items in a tradesman's account or the entries in a banker's book; it is for loss of character so much, for loss of health so much, for loss of the society and protection of relations and friends so much, and for the loss of a settlement for life so much. How is the Court to audit this account, so as to say that in every possible state of it the jury has done wrong? How, my Lord, are my observations, weak as they are as proceeding from me, but strong as supported by the subject, to be answered? Only by ridicule which the facts do not furnish, and at which even folly, when coupled with humanity or justice, cannot smile. We are, besides, not in a theatre, but in a Court of law, and when Judges are to draw grave conclusions from facts, which not being under re-examination cannot be distorted by observation, they will hardly be turned aside from justice by a jest. I therefore claim for the plaintiff the damages which the jury gave her under these directions from your Lordship, 'That they were so entirely within their province, that you would not lead their judgments by a single observation.'"

Summons for breach of promise of marriage.

(Heading.)

Command A.B. of . . . . hereinafter called the defendant, that within . . . . days after the service of this summons, he cause an appearance to be entered in our Supreme Court of our said Colony, at Cape Town, to answer C.D. of . . . . hereinafter called the plaintiff, in an action wherein the plaintiff claims payment of the sum of £ . . . . sterling as and for damages sustained by reason that the defendant, having on or about the . . . . day of . . . . at . . . . duly entered into an engagement and promised to marry the plaintiff, did, without lawful cause or excuse, break the said engagement and promise of marriage, and refuse to marry her.

(NOTE.—*If, in addition to the breach of promise, the defendant has also seduced the plaintiff, and she has been delivered of a child, then add the following Counts*):—

2. The sum of £ . . . . sterling, as and for damages sustained by reason that the said defendant, under the promise of marriage as aforesaid, did, on or about the . . . . day of . . . ., debauch, seduce, and carnally know the said plaintiff, whereby she became pregnant, and she was, on the . . . . day of . . . . delivered of a . . . . child.

3. The sum of £ . . . . sterling for the lying-in expenses and the

delivery of the said child upon the occasion referred to, and for the necessary nursing and taking care of the said plaintiff.

4. The sum of £ . . . . sterling per month for the maintenance, education and support of the child till the age of majority.

(NOTE.—*Instead of splitting up the various claims as done here, the whole cause of action may be in one Count, for one sum of money, as for instance, after clause one, proceed*):—

Also for the seduction of the plaintiff by the defendant, on or about the . . . . day of . . . . ; and her pregnancy and the birth of a child in consequence thereof; and for the lying-in expenses, and for the maintenance and education of the child.

As it is said, &c.

CHAPTER XXV.

SEDUCTION.

SEDUCTION is "the offence of a man who induces a virgin to "surrender her chastity to him."

The action for seduction can be brought only by a woman who has been deflowered or deprived of her virginity; and therefore a married woman, or a widow, cannot maintain this action.[1]

This action lies, though the seduction may have been with the full and free consent of the woman. Indeed, in seduction, the act should always be voluntary and no violence should be used, in order to distinguish it from the crime of rape, which means "the violent, or forcible, ravishing of a "woman, whether married, or a widow, or a virgin, against her "free will and consent."

But the woman cannot maintain this action against a married man who has deflowered her if she were aware at the time of the seduction of his marriage.[2] Nor has she this action against any one with whom, before *concubitus*, she stipulated for, or received, any money on account thereof.[3] But although she cannot bring an action for seduction against a man whom she knew to be married, or who has paid her, yet it does not bar her from instituting and maintaining an action against him for affiliation.[4]

To maintain the action for seduction the woman must make oath *that she never has had carnal connection with any other man.* If she cannot swear to this, she fails in her

[1] Sande, 2, 1, 10.

[2] Hol. Con., Vol. 1; Con. 226; and Vol. 3, Con. 31; Sande, 1, 10, 2; Schorer, 3, 35, 8.

[3] Grotius, 3, 35, 8; Wassenaar, 1, 20, 7; Berg's Advies Book, Vol. 2, Con. 143.

[4] See Chapter "*Affiliation.*"

action. But even if she does swear it, though ever so stoutly, her mere oath, or statement, unsupported by evidence *aliunde*, is not to be taken as against the man, whose oath is to be preferred to the woman's if he denies that he has ever had carnal connection with her.[1]

Although by the law of nature a person has no right to complain if anything has been done by his consent, yet by the Mosaic law it was enacted that a person who had deflowered a virgin, even with her consent, was bound to marry her,[2] and so also was the law formerly in some parts in Holland on account of the natural weakness of the female sex. But in later times, when it was found by experience that many designing females, servants, and base women, relying upon this law, enticed the sons of their masters, or persons of high rank, to debauchery, in order to force them to a marriage, the law was altered, and in its stead it was enacted that the seducer was bound *either* to marry the woman, or to give her a money compensation.[3] But when the woman could prove a previous promise of marriage, the man was bound to marry her, unless he were a son of her master;[4] and such also was the law of this Colony.[5] But this law has been since altered by the Marriage Ordinance of 7th September, 1838; and the only remedy the woman has now, in this Colony, in an action for seduction, is to sue for money compensation for damages for the loss she may have sustained thereby.

The amount of compensation to be awarded in such an action is entirely in the discretion of the Court, and depends upon the nature of each case and the circumstances of both parties; and is usually estimated according to the means of the man and the social position of the woman.

No hard-and-fast rule can be laid down in such a matter. If the seduction was preceded by a lawful promise of marriage

[1] Sande, 1, 10, 2; Van der Keessel, 801; Van der Linden, 1, 16, 4; *Heckroodt* vs. *Breda*; *Weyers* vs. *Stopforth*, 1 M., 337 and 273; *Gleeser* vs. *Durham*, B. for 1868, p. 244; Wassenaar, 1, 20, 5; Hol. Con., Vol. 1, Con. 308; Berg's Adv. Bk., Vol. 2, Con. 143; Grotius, 3, 35, 8; *Le Roux* vs. *Neethling*, 9 J., 247; *Smitsdorf* vs. *Horne*, 1 R., 32.

[2] Exodus, Chap. 22, v. 16; Deut., Chap. 22, vv. 28 and 29.

[3] Placaat of 18th March, 1666, G.P.B., Vol. 4, p. 1048, § 14; and Placaat of 24th January, 1673, G.P.B., Vol. 3, p. 598, § 15.

[4] Loenius, 66.

[5] *Jooste* vs. *Grobbelaar*, 1 M., 149.

which has afterwards been broken, this increases the measure of damages; and so also would the damages be increased if the woman under these circumstances gave birth to a child. The damages in such a case may therefore be in one action, and include breach of promise of marriage, seduction, affiliation, lying-in expenses, and maintenance of the child. If the man's pecuniary means can be proved at the trial, it will assist the Court in estimating the amount of damages to be awarded proportionate to his means; but this proof is not legally necessary. Separate actions may be brought after the occurrence of each event; such as, one for seduction, another for breach of promise, a third for affiliation, and so on; but this is not advisable and, in practice, is never done. The action is generally delayed till the woman is certain she is not *enceinte*, or till after the birth of the child, as the splitting up of actions is not only unnecessarily annoying, but may prevent the party getting costs for more than one action.[1]

The action for seduction becomes prescribed and cannot be brought after a lapse of five years from the alleged date of defloration.[2]

Summons in an action for seduction.

(Heading.)

Command A.B. of . . . ., hereinafter called the defendant, that within . . . . days after service of this summons, he cause an appearance to be entered in our Supreme Court of our said Colony, at Cape Town, to answer C.D. of . . . ., hereinafter called the plaintiff, in an action wherein the plaintiff claims payment of the sum of £ . . . . sterling, as and for damages sustained by reason that the defendant, on or about the . . . . day of . . . . at . . . ., wrongfully debauched, seduced and carnally knew the said defendant.

(NOTE.—*If the seduction was in consequence of a promise of marriage, then allege it; and if it was followed by pregnancy and the birth of a child, then put in counts for these also. See form to Chapter on "Breach of Promise of Marriage."*)

As it is said, &c.

[1] See Chapters "*Affiliation*" and "*Breach of Promise of Marriage.*"

[2] Hol. Con., Vol. 1, Con. 148.

CHAPTER XXVI.

AFFILIATION.

AFFILIATION is "an action for the establishment of the "paternity of a bastard child."

This action can be brought by any woman, whether a virgin or a widow, who has been delivered of a child, the father of whom she can point out; and it is only for the maintenance of the child, and in no way as a compensation or support to the mother. A married woman can also maintain this action against the father (other than her husband) of the child, though this child be conceived during her marriage still subsisting, if there is evidence satisfactory to the Court that the husband has had no access to the wife within a period of probability that he might be the father of the child; and she may institute this action without the assistance or knowledge of her husband.[1]

This action, being for maintenance of the child, does not lie if the child be born dead; but the woman may bring the action to establish the paternity of the child, for the purpose of making the man pay the necessary expenses she may have been put to in consequence of being *enceinte* by him, and for the lying-in and funeral expenses.

Under the lying-in charges are included all the necessary preparations and expenses incurred in anticipation of the birth of the child, according to the mother's station in life; the necessary clothing for the child; the midwife, nurse, and

[1] *Bam* vs. *Pybus*, decided in 1884, not reported. See also *Abrahams* vs. *Adams*, B. for 1878, p. 85, and Saunders on Affiliation, 8th Ed., pp. 66–70.

medical expenses and medicines until the woman shall have recovered from the effects of child-birth.

As to how long the maintenance of the child is to continue is entirely in the discretion of the Court, and must be judged of according to the nature of each case. Sometimes the Court has declared the maintenance to continue until the child should attain the age of majority; at other times until the child has attained the age of 16 years;[1] in some cases until the child has attained the age of puberty; and in other cases, without fixing any special time, such as at so much per month,[2] or "till the further order of the Court." Sometimes again, instead of a monthly support, the Court has ordered a round sum to be paid to the mother in lieu of all claims or demands for herself, or her child, or both. In a case where the Court has fixed no definite length of time for the maintenance of a child, it is in the power of the defendant to move the Court, at any time thereafter, for relief; and to have it declared that the maintenance is no longer necessary. To obtain this relief the man must shew good grounds for his application, such as that the child can obtain, or is able to earn, his, or her, own living, before the Court will be justified in discharging him from the burden of the further support of the child. The mother, or the child's guardian, should have notice of such an application.

The amount of maintenance also differs, and depends upon the nature of the case, the means of the parties, and the social position of the woman. It is advisable therefore, though not legally necessary, to prove at the trial the man's pecuniary means, so as to assist the Court in arriving at the amount of maintenance to be fixed.

In an action for affiliation, the oath of the man is preferred before that of the woman, if her oath is unsupported by evidence *aliunde*, even though she were to swear to the paternity of the child during the pains of child-birth, or while in a dying state.[3]

As to how far this *aliunde* evidence is to be taken in

[1] *Joubert* vs. *Thomson*, decided in December, 1891; 1 C. T., 350.

[2] *Crow* vs. *Dyason*; decided in 1863, not reported.

[3] Hol. Con., Vol. 1, Cons. 301 and 308, and *Le Roux* vs. *Neethling*, 9 J., 247.

support of the woman's oath must depend entirely upon the nature of the evidence adduced; and the Court must exercise its own discretion in case of doubt, or of conflict of evidence, as to how far credence can be given to the opposing evidence of the plaintiff and her witnesses.[1]

But if the man admits, or it is proved, that he has had connection with the woman, though a year, or even a month, before the birth of the child, he is not exonerated, but is liable, if the woman charges him with the paternity.[2] This doctrine may seem startling, but it must be observed that, if the date of the connection only is in dispute, the man is presumed to be mistaken as to the time, and the woman is regarded as more likely to remember it.[3] But though the three authors here quoted give the time of a year or a month, it is only as to the latitude or limitation of the period of probabilities, and it is still for the defendant to prove to the satisfaction of the Court from dates supplied by him and other circumstances that he cannot be the father of the child. If he succeeds in this, then, as in the concluding part of the next paragraph, he is exonerated.

So also for the purpose of proving, for instance, accession to an inheritance, and as to the general legitimacy of children, great latitude is allowed respecting the time of conception, the minimum being limited to 7, and the maximum to 11 months, *unless there be evidence of the man's impotence, or of absence on his part inconsistent with the period of pregnancy.*[4] For the same reason, therefore, in an action for affiliation, if the question of the time be not in dispute, and the *man can satisfy the Court that he was absent, or so situated as to make it utterly impossible that the woman could be pregnant by him, he is to be absolved from the paternity of the child.*

But, while the woman's oath as to the connection is not to be believed in preference to the man's, and while the man is not to be believed in preference to the woman as to the *time* he may fix upon in order to free himself, there is still the more startling doctrine that, even if the woman be a common

[1] Ibid.
[2] Berg's Advies Book, Vol. 2, Con. 143; Schorer, 1, 12, 3.
[3] Grotius, 3, 35, 8, and notes.
[4] Grotius, 1, 12, 3; Sande, 4, 8, 10.

prostitute and admits, or it is proved, that a great many other men also have had connection with her during the period, the man upon whom she fixes the paternity is liable; for, in this respect the woman's oath is to be believed in pointing out the father of her child.[1] This, like the questions of time, and of the connection, we can only account for on *the supposition that the object of the law was to put down and punish immorality* by straining every point against the relief of people who have illicit carnal intercourse. But while the prostitute can maintain her action, she is not at liberty to fix upon more than one person as being the father of her child. *Of course, while the law presumes the mother capable of pointing out the father of the child, it is still in the discretion of the Court to disbelieve her oath, when warranted in so doing by the opposing evidence and the surrounding circumstances of the case.* Thus, in the case of *Smitsdorff* vs. *Home*, decided in the Supreme Court in August, 1862,[2] the woman swore that she was a virgin and was seduced by the defendant, and that no other man had had connection with her. Evidence was produced by the defendant that other men had had connection with her before, as well as after the alleged date of seduction. The late Mr. Justice Watermeyer, in giving judgment, after referring to Voet, 48, 5, 6, said :—

"With reference to affiliation the law is severe against those who "have had connection with prostitutes, and the law will believe even "prostitutes swearing to paternity, if it be once admitted, or clearly "proved, that there has been connection with them. But while the law "presumes in favour of the oath of the woman, presuming that she has "knowledge of the father of the child, although she may have had con-"nection with others, it is only if that testimony is given in such a "manner as to justify the Court in attaching faith to what is sworn by "the woman. A prostitute coming into Court may swear, and may be "believed on swearing, that one who has had connection with her, though "others also have had, is the father of the child. Admitting that she is "a prostitute, and admitting that she has had connection with others, she "may swear this and the law says she is to be believed; but *this can "only be if the Court find that she is worthy of belief:* for, although her "knowledge of the fact is assumed, and therefore, if she speaks the truth "she is to be believed, it does not follow that the Court is to believe a "person upon one point who, with reference to all other questions put to "her in the box, has told falsehoods. This young woman is in this

[1] Wassenaar, 1, 20, 6.

[2] Not reported.

"unfortunate position. She swears that she was a virgin when first the "defendant knew her. This is proved false. She swears that she knew "no other man; that she never had carnal connection with anyone else "either before or after the connection of defendant with her. This is "false also. These things being false, it is impossible for the Court to "believe her when she says that defendant is the father of the child, "*although the law presumes that she knows who the father is.* To that "extent the law goes, but no further. It does not compel the Court "under all the circumstances to believe her assertions."

In the case of *Le Roex* vs. *Neethling*,[1] De Villiers, C.J., said :—

"It was impossible to lay down any general rule as to what degree of "evidence was required to fix a person with the paternity of a child. "The Dutch authorities had attempted to lay down rules as to the degree "of corroboration required to support the plaintiff's evidence, and as to "the circumstances under which the denial must be taken of the alleged "father. But . . . *it might be laid down generally in a case of this kind* "*that the plaintiff who tried to fix the paternity of a child on a man must* "*clearly prove it, and must be corroborated by some independent testimony,* "*and in case of doubt the benefit should be given to the defendant.*"

In the action for affiliation and for maintenance may be included, if it happened, breach of promise and seduction. This action becomes prescribed after the lapse of five years from the date of the birth of the child.[2]

When all the actions—breach of promise, seduction, affiliation, lying-in expenses, and maintenance—are cumulated, or joined in one summons, though a separate count or claim is made for each cause of action, the Court often gives damages for one round sum to cover all.

The action for affiliation is now abolished in Holland and in France.

The following are some of the differences between this action and the action for seduction :—

(*a*) The action for seduction can be brought only by a woman who alleges that she was a virgin at the time of the connection complained of; but the action for affiliation may be brought by any woman, whether married or single, who alleges that she is pregnant by a man not her husband.

(*b*) In the action for seduction the woman must make

[1] 2 C. T., 183.

[2] Hol. Con., Vol. 1, Con. 148.

oath that she has not had carnal connection with any other man before the alleged date of seduction; but in affiliation it is not necessary.

(*c*) In the action for seduction the damages are for compensation to the woman; but in affiliation they are for the maintenance of the child, except as to lying-in expenses.

Summons for affiliation.

(Heading.)

. . . . wherein the plaintiff claims payment of the sum of £ . . . . sterling, as and for the lying-in and medical expenses, and nursing and taking care of, the said plaintiff who, on or about the . . . . day of . . . . was delivered of a $\frac{\text{male}}{\text{female}}$ child, of which the defendant is the father, in consequence of the carnal connection he had with the plaintiff on or about the . . . . day of . . . . at . . . . and on divers days and times after that day. (*Note—if the child is alive and has to be maintained, then add, as for instance*), and the further sum of £ . . . . sterling per month for the maintenance and support of the said child from the . . . . day of . . . . last past (*the day of the birth*) till the age of majority. (*Note—if the child was born dead and has been buried, then in lieu of this last clause, say:*) and the further sum of £ . . . . sterling, being the amount for the necessary funeral expenses of the said child.

As it is said, &c.

CHAPTER XXVII.

MARRIAGE.

NONE of the social laws has engaged the attention of jurists more than that of marriage. The history of the subject is an interesting study, and in parts amusing, while in other parts —like marriage itself—(this remark is *not* for ladies !) is conflicting, disappointing, and difficult to reconcile. My duty is, however, an easy one, as, from a practitioner's point of view, I have to deal with only so much of the incidents of marriage, affecting the persons and their goods, as shall serve as a skeleton outline to the young student and the busy practitioner in questions as to the requirements of a lawful marriage, the effect thereof on the property of the spouses, and as to the forfeiture of the goods in actions of divorce. The chapter on "Divorce" should therefore be read with this.

In the Mosaic period a person was excused from military service, *and any business*, for a whole year after marriage,[1] a privilege which some of my friends, who got married last Christmas, wished was in force in our times also, as they could get no leave from their employers, beyond the holidays, for their honeymoon. But Moses never compelled marriage, and in this he was more considerate than Lycurgus; for among the Greeks marriage was compulsory, and men were expected to marry between the ages of 30 and 35, and women about 20; and, if they did not do so, were punished. By the laws of Lycurgus criminal proceedings might also be taken against those who married too late, or not at all; and in the choice

[1] Deut. xx. 7, and xxiv. 5.

of a wife men ought, they said, to consult the interests of the State, and not their own pleasure.

The privileges of Lamech[1] and King Solomon[2] in regard to the plurality of wives are no longer tolerated, as polygamy is strictly prohibited among, and even punished by, all civilised countries which still follow the ancient command that a man can have only one wife and a woman only one husband.[3]

Marriage may be defined as "the union of one man with "one woman until the death of the first dying, or until it be "earlier dissolved by a competent Court of law, with the "intention of having and rearing legitimate offspring."

Many writers have denied that the object of marriage is to have offspring. It can serve no good purpose to enter into a discussion of the question here. Suffice it to say that the definition is according to Holy Writ.[4]

Though persons may be engaged to be married from the age of seven, they are forbidden to marry before the age of puberty, which is 14 for males and 12 for females. But in either case the consent of parents or guardians is required to the engagement, and to the marriage after these ages, until the age of majority, viz. 21 for both males and females, when this consent is no longer required; and the parties may, after attaining majority, marry against the wish and without the knowledge of the parents or guardians.

By the Placaat of Charles V. of the 4th Oct., 1540, § 17,[5] the marriage of minors, without the consent of the parents or guardians, was prohibited under certain penalties, but the marriage would not be void, if otherwise there was no objection to it;[6] and so also has the Supreme Court decided that the marriage of a minor, without consent of the guardians, must be deemed to be valid until annulled for any other good reason by judgment of a competent Court.[7]

The consent should be given by both parents, since the mother's consent is required as much as the father's; and if

[1] Gen. iv. 19.
[2] Proverbs v. 15, 29; and xxxi. 10, 31.
[3] Gen. ii. 24.
[4] Gen. ii. 24; St. Matt. xix. 3–9; St. Mark x. 6 and 8; and Grotius 1, 3, 8.
[5] G.P.B., Vol. 1, p. 311.
[6] Consult also v.d. Keessel, 50 and 76.
[7] *Haupt* vs. *Haupt*, 7 C. T., 49; and 14 S. C., 39.

the two cannot agree, then the Judge should decide according to the circumstances of the case.[1]

When a parent or guardian refuses, or unreasonably or improperly withholds, his or her consent to the marriage of a minor child, or is disabled from giving it—either by being insane, or by absence from the Colony, or from whatever other cause—or is dead, or if there is no one to consent, then such minor can apply by petition to the Chief Justice, or now also to a Judge President within his local jurisdiction, for leave to marry without that consent. The petition should set forth the engagement and desire to marry the party named, and should give the reasons for the application. If the parents or guardians are within the Colony, a time may be fixed by the Judge for hearing their objections. This enquiry is summary and private, before him in his chambers, and the granting or withholding the order for the marriage is entirely in his discretion. If the proposed marriage should, upon examination, appear to him to be proper, he may judicially declare by an order in writing under his hand that such is proper and may be solemnised forthwith; which order is sufficient to authorise any marriage officer to solemnise the marriage.[2] The power conferred on the Chief Justice by this section of the Ordinance is now (1896) so amended that it may be exercised also by the respective Judges President of the E. D. Court and High Court of Griqualand West within their several jurisdictions, and in case of absence of them from their respective courts then by the next senior Judge of such courts.[3] This order of the Chief Justice or any of the Judges President within their respective jurisdictions for leave to marry does not do away with the necessity for either a publication of the banns or taking out a licence to marry. It only supplies the consent which the parent or guardian should have given. Of course it is in the power of the Judge to whom the application is made to withhold this consent on good grounds, such as that the marriage is not desirable or is unsuitable, or on whatever other ground may appear to him

[1] Hol. Con., Vol. 5, Con. 189; v.d. Leeuwen, 1, 14, 9–11.

[2] § 17 of the Marriage Order in Council of 1838.

[3] § 55 of Act 35 of 1896.

to be reasonable. There is no appeal from his decision; and, if he refuses the order, the petitioner must wait till he or she is of age. But if a minor should clandestinely marry without the consent of his or her guardian, or of the Judge, the marriage would not thereby be void; but no community of property would take place, and neither spouse could benefit the other by gift or will.[1] The leave to marry granted by a Judge does not carry with it the right to enter into an antenuptial contract. Some person should be appointed to assist the minor in the execution of the antenuptial contract.

But, apart from the objection of parents or guardians on the ground of minority, they have also the right to object to the marriage of majors, if the marriage is to the loss or prejudice of a third person, or to the disgrace of their families. For instance:—

(*a*) If the man stands reputed before the world as an infamous or a dishonest person; or if the woman is a prostitute or a dishonest person.[2]

(*b*) If the guardians can prove that the man has no means of subsistence, and thus cannot support the marriage; also if the woman is incapable to support the marriage; or if both are laden with debts which they will not be able to pay.[3]

Formerly the party refusing to fulfil the promise of marriage could be forced, even by civil imprisonment, to marry the other; but this has been abolished, and the only remedy now is an action for damages.[4]

Before a marriage can be solemnised it must be preceded by the publication of the banns, or a special licence must be obtained. The object of the publication of the banns is to give publicity to the intended marriage, so that anyone who has a lawful objection to make may lodge it in time with the clergyman or marriage officer who publishes the banns; and if he takes no notice of the objection, an interdict may be obtained from the Court or a Judge. The objection may be made at any time, even after the publication of the banns, but before the completion of the marriage.

[1] *Mostert* vs. *the Master*, 3 R., 59.
[2] Hol. Con., Vol. 6, Con. 107.
[3] Van Zurck's Codex Batavus, Tit. "Appel," § 59.
[4] See Chapter "*Breach of Promise.*"

When a person who has a right to object to the publication of the banns of a minor does so, the marriage officer is prohibited from solemnising the marriage of such minor, and the publication of the banns is void; but if no objection to the marriage has been lodged, then such marriage officer is not liable to any action for having solemnised the marriage without the consent of the parents or guardians.[1]

I shall treat here separately of the publication of banns; (*a*) in church and (*b*) by a magistrate.

(*a*) In Church.

The publication of the banns must take place on three successive Sundays preceding the solemnisation of the marriage; and must be made, in an audible manner some time during the morning service, in the presence of the congregation, in the parish in which the parties reside; or where there is no morning service, during the evening service.[2] If the parties reside in different parishes then the banns must be published in both parishes, and if they are of different persuasions, then also before each of the congregations to which they severally belong, whether both congregations are in the same parish or not.[3] If the banns should be published, one in this Colony and the other in another country, the officiating minister may solemnise such a marriage upon production of the certificates of the publication of the banns.[4] Whether the marriage is by virtue of banns in a church, or special licence, no period of local residence is necessary, as in England, preparatory to the marriage; but when the banns are to be published by a magistrate, then 14 days' residence is necessary. If the regular publication of the banns should be interrupted, no matter for what cause, the banns must be published afresh.[5]

Immediately after the last publication of the banns the marriage may take place. But it must be solemnised within three calendar months after this last publication; otherwise

[1] §§ 10 and 14 of said Marriage Ord., and §§ 5, 6 and 7 of Act 16 of 1861.

[2] § 2 of said Marriage Ord.

[3] § 3.

[4] Act 28 of 1897.

[5] V.d. Linden, 1, 2, 6.

the publication is void, and the banns must be published anew in the same manner as before.[1]

But it has been decided that, for any weighty reason, and where the publication of the banns on successive Sundays cannot take place, all the three banns may be published in one day. Thus, in the case of a skipper who called at a port for the purpose of getting married, all the banns were published in one day: nay more, a marriage contracted *in articulo mortis*, without the publication of any banns, has been held good. Such was the case of Dr. Spont, who had lived with a woman, named Sarah Claris, by whom he had children. He was in a dying state on a Sunday night, when no banns could be published and no licence for his marriage could be obtained. A clergyman solemnised the marriage on the ground of it being a case *in extremis;* and the Supreme Court of Holland held that as there was no legal impediment to the marriage, it was valid; and also declared the children procreated by her to be legitimate.[2] But in all such cases of marriages *in extremis*, it must be shewn that there is no legal impediment to the marriage itself; that the banns could not be published; and that no licence could be obtained, owing to the extreme urgency.

A marriage, by virtue of banns published in a church, can be solemnised only by a clergyman; and a marriage, by virtue of banns published by a Magistrate, can be solemnised only by a magistrate, and not *vice versâ*.

(*b*) By a Magistrate.

If the banns are to be published by a Magistrate, a written notice must be given to him by one of the parties, setting forth the names and addresses, condition, age, occupation and length of residence; and the Magistrate (this must be within the district where each of the parties has dwelt for not less than 14 days), on receiving such notice, affixes it, in some conspicuous place, to the Court-house, and at the next Court day reads it in open Court. This notice is to be read also on

[1] § 9 of said Marriage Ord.

[2] Loenius, 79.

not less than two other Court days, allowing an interval of not less than three clear days between each reading, and the three readings must be gone through within 21 days from the receipt of the notice;[1] and, if the parties reside in different districts, the banns must be published similarly in each district.[2]

Any person whose consent is required to the marriage may forbid it;[3] and anyone who knows of a lawful impediment to the marriage may lodge an objection thereto with the magistrate within the 21 days.[4] On the receipt of the objection the magistrate shall subpœna witnesses in the usual way, and examine them on oath relative to the fact involved in the objection; and, if a question of law is involved, on which he does not feel himself competent to decide, he must get the parties to obtain counsel's opinion thereon: but, if they are too poor to do so, the magistrate must get the Attorney-General's opinion free of charge. On receipt of the opinion the magistrate may give his decision; and, if either party is dissatisfied, he may appeal, upon a petition of facts, to the Supreme Court or a Judge, provided he has given a written notice to the magistrate of his intention to appeal not later than seven days after the decision.

The Court, or Judge, may, upon due notice to the other side, enquire into the allegations of the petitioner, also call for further evidence, if necessary, and, in the most expeditious and inexpensive manner, determine the matters in controversy or order a regular action to be instituted and pleadings to be filed. Persons who lodge frivolous objections are liable to an action for damages; and those who lodge mischievous or fictitious objections are liable also to a fine of £50, or three months' hard labour; and any person who sends a notice of marriage, or an objection to an intended marriage, containing a wilfully false statement, is liable to a fine of £100, or to 12 months' hard labour, or both.[5]

The banns being duly published, whether in church or by a magistrate, and there being no objection lodged, the

[1] Schedule A to Act 16 of 1860, §§ 1–5.
[2] § 2.
[3] § 7.
[4] § 5.
[5] §§ 14–28 of said Schedule.

solemnization of the marriage may take place at any time within three months of the last banns.[1] The marriage, when the banns have been published in a church, may be solemnized between the hours of 8 a.m. and 4 p.m.;[2] while a marriage before a magistrate must be between the hours of 9 and 12 a.m.[3] But, as in neither case is any penalty or disability attached, if the marriage should be solemnized either before or after the hours prescribed, the limitations as to hours are for all legal purposes useless; and the marriage will consequently be valid if solemnized at any time of the day or night. The hours must therefore be taken to have been fixed for the convenience of the clergyman or magistrate, who cannot be compelled to marry before or after those hours.

But where the parties do not desire to have the banns published, they may marry by special licence. This licence was originally called a *Dispensation* to marry, and could be granted in Holland, formerly, by the Sovereign only, and, with us, by the Governor only. The doctrine of dispensation is derived from the canon law, and means a permission to marry by foregoing, or doing away with, the preliminary ceremonies. But, now that the Special Marriage Licence really means nothing more than a source of revenue, and may be sold by any stamp vendor, and signed by a magistrate,[4] the charm of their canonical sanctity, accompanied by the Pope's blessing, or in Holland by the Kingly, or in this country, the Gubernatorial autograph, with huge seal appended, is taken away; and the local magistrate may, in his own platonic, matter-of-fact sort of way, grant the licence to marry without the publication of banns.

Before, however, granting the licence the duty of the magistrate is to satisfy himself that there is no legal impediment to the proposed marriage;[5] and the parties must have appeared before him, and signed a solemn declaration to the effect that there is no just impediment to the marriage between them.[6] No such licence shall be granted by a magistrate to a widower or widow until proof be shewn that

[1] § 9 of the said Ordinance; and § 13 of Schedule A to Act 16 of 1860.
[2] § 21 of said Ordinance.
[3] § 8 of said Schedule.
[4] § 3, Act 9 of 1882.
[5] § 8 of Act 9 of 1882.
[6] § 5.

the portions of the minors by the former marriage are secured to them, or that there is no inheritance to be secured.[1] Nor shall the licence be granted in the case of minors, unless there is proof of the consent of the guardians, or an order from the Judge.[2] Any person wishing to obtain such licence to marry, who makes a false declaration, or a false statement in answer to any question put by a magistrate, or who forges or fraudulently alters a consent to the marriage of a minor, or who forges or fraudulently alters any licence to marry, shall be liable to five years' hard labour.[3]

When a licence to marry has been obtained, the parties may have the marriage solemnized by any minister, or magistrate, or marriage-officer they please, and at any place in the Colony they may please to select.

The marriage is completed from the moment when the parties have, in the presence of two witnesses and before a marriage-officer, accepted or acknowledged each other to be husband and wife. This acceptance, of course, must be serious and voluntary. All the ceremonies, prayers, singings, benedictions, before or after, have nothing whatever to do with the legal act of completion of the marriage. The old Roman idea that a certain number of days must intervene, or that the parties must have slept together, or the later idea, that they must have consummated the marriage, have nothing whatever to do with the question. The rule is "*nuptias consensus non concubitis facit;*" and whatever be the form prescribed by each particular Church or persuasion, the point to be looked to is, the act or moment of acknowledgment of each other as husband and wife. Thus, for instance, in the Church of England the marriage is completed when the bridegroom and bride say respectively :—

"I, M. take thee N. to my wedded wife."

And "I, N. take thee M. to my wedded husband."

In the Dutch Reformed Church a similar declaration is made, though in a much longer form. The taking each other's right hand in the latter Church, at the bidding of the clergyman, is only an acknowledgment of the marriage, and

[1] § 6. [2] § 7. [3] § 9.

forms no part of the legality of it. So, also, the declaration of the bridegroom in the former church "With this ring I thee wed," is not necessary to the legality of the marriage. In most religious communities no ring is used, though, as it has become fashionable, and in the English Church necessary, to have a wedding-ring, the clergymen of some churches sometimes say to the parties, during a part of the service, that they may then put on the ring. In the Synagogues the bridegroom is made to say: "Behold thou art betrothed to "me with this ring according to the rites of Moses and "Israel." The bride and bridegroom then taste the wine, and an empty glass is laid on the floor, which the bridegroom breaks by stamping on it. This completes the act of marriage among the Jews. The service, preceding and following, and the reading of the contract of marriage, have nothing to do with the formal acceptance or acknowledgment of the marriage. Before a magistrate the marriage is completed when the parties have declared to the form of declaration prescribed by the said Act.

If then, during the ceremony, but before the acknowledgment of each other as husband and wife, either party were to die, or to refuse to proceed with the ceremony, there would be no marriage: for the same reason, if, immediately after such acknowledgment, though still during the ceremony, either party were to die, or to retire from the service, the marriage would be completed; and where no antenuptial contract has been made, community of property would immediately take place.[1]

If the parties are of different religious persuasions and they agree, as is frequently done, to have the marriage solemnized in their respective churches, then the first solemnization, in whichever church, completes the marriage. Thus, suppose a member of the Church of England agreed with the daughter of a Rabbi to marry each other, first in the Rabbi's Synagogue and then in that member's own Cathedral, the acknowledgment of each other in the Synagogue would complete the marriage; and, if either party could not or would not go to the Cathedral, or were to die on the way, the

[1] Grotius, 1, 5, 17; Regts. Obs., 2, 32; V. d. Keessel, 87: Loenius, 7.

marriage at the Synagogue would be binding on both. But if the marriage had taken place in the Cathedral also, as agreed upon, and either party afterwards wished to sue the other for a good cause of divorce, the marriage to be proved at the trial would be the one that took place first, viz., at the Synagogue.

The signing of the Register of Marriage is only to serve as evidence of the marriage and the more easy proof thereof; but it is not absolutely necessary to the validity of the marriage, if the other requisites have been complied with. Clergymen and other marriage-officers are nevertheless bound to see, as part of their duty, that the Register is duly signed.

Persons in this Colony can be married only before duly authorized marriage-officers. All ministers of the Christian religion, duly ordained, are, by virtue of their office, marriage-officers,[1] and all Resident Magistrates are, *ex officio*, marriage-officers;[2] but an unordained missionary of the D. R. Church, set apart to preach the gospel among the heathen, is not a marriage-officer within the meaning of the Marriage Ordinance. Still, having regard to the 18th section of that Ordinance, a marriage by such an one, under the *bonâ fide* belief that he could solemnize it, and as it was not otherwise challenged by the parties, was held good.[3] All marriages, therefore, solemnized before a person who is neither a minister of the Christian religion nor a Resident Magistrate, nor a duly appointed marriage-officer, are void. Thus, the Malay and native marriages are void, though performed according to their religious customs.[4] But the Governor has the power to appoint special marriage-officers, whom and when and where he may deem necessary, so as to afford facilities for the marriages of persons of other or of different persuasions.[5]

As the question has occasionally been put at the public examinations, what great principle was settled in the famous Scotch case *Dalrymple* vs. *Dalrymple*, decided in the Con-

[1] § 2 of said Ordinance.
[2] § 1 of said Act.
[3] *Schlechting* vs. *Schlechting*, B. for 1875, p. 24.
[4] *Nanto* vs. *Malgas*, 5 J., 108; *Queen* vs. *Wells*, 1 A., 1; *Queen* vs. *Lodewyk*, ibid, p. 365; *Brown* vs. *Brown's Executors*, 3 S., 313.
[5] § 12 of said Ord., and § 4 of said Act.

sistorial Court of London in 1811, I will here mention it. By the then law of Scotland, especially in what were called the Gretna Green marriages, the bare consent of the parties to marry, expressed in the presence of two witnesses, was sufficient. There was no marriage-officer and no registry. This was the paper signed by the parties:—

"I hereby declare that Johanna Gordon is my lawful "wife."

"I hereby acknowledge John Dalrymple as my lawful "husband."

When John got tired of Johanna, he disputed the marriage and married another lady: but the Court decided that the marriage with Johanna was valid, and not that with the other lady; and decided also that they could call in expert evidence to prove what the law of Scotland was on the subject. I have a full report of this old case, with the long and learned judgment of Sir William Scott.

Marriage-officers are prohibited from solemnizing the marriage of any widower or widow without proof that the inheritance, or portions due to his or her minor children, out of the estate of the predeceased spouse, have been ascertained, and secured either by depositing the amount in the Guardians' Fund with the Master, or by securing it by a deed of "Kinderbewys." This proof should be in the form of a certificate either from the Master or from the Registrar of Deeds;[1] and any widower or widow, marrying without having previously secured the minors' portions, shall forfeit one-fourth part of his or her estate for the benefit of the minor children.[2] But the Magistrate is authorized to grant his Certificate to the marriage-officer enabling the parties to marry without their giving the security, if he is satisfied that the estate out of which the minors are to get their portions is under £100 in value.[3] Of course where the surviving spouse is not the executor, and has not the administration of the estate of the predeceased spouse, nor the inheritance of minor children, under his control, he or she cannot be compelled to give security before a re-marriage. But the marriage-

[1] §§ 1, 2, and 6 of Act 12 of 1856.
[2] § 22 of Ord. 105.
[3] § 3 of Act 12 of 1856, and § 6 of Act 9 of 1882.

officer must be satisfied of this, generally by an affidavit which states who has the administration of the estate of the deceased, and of the children's inheritance.

A marriage should be freely and voluntarily entered into by each party; no undue influence should be used; nor force; nor fraud; nor should there be any penalty attached for non-fulfilment: otherwise it will be void *ab initio.*[1] A marriage entered into through fraud is void *ab initio;* for instance, where a man believes he is marrying a virgin, and it can be proved that at the time of marriage she was pregnant by another man;[2] or, where by the deceit of others he marries a wrong person, as was the case of Jacob, who did not discover till next morning the substitution of Leah for Rachel.[3]

If either party boasts or gives out that he or she is married to the other, when it is not so, the latter has an action against the former, which is called a "jactitation" action; hence also the pretended marriage is called a jactitation marriage. This action should be for Perpetual Silence against the jactitator.[4]

In Holland a marriage may be contracted by proxy,[5] and this is to this day still frequently done, where either of the parties is not in the country. In Spain it is also a common custom. But with us, as in England, marriage cannot be by proxy. A man here, however, may send his power of attorney to Holland to be married there by proxy. I have drawn such powers myself.

A marriage may be prohibited in affinity in the same degree as in consanguinity.[6] Every generation constitutes a degree; and the way to calculate the degrees in the ascending and descending lines is as follows:—

(*a*) A man's father and son are related to him in the first degree.

(*b*) The grandfathers and grandsons in the second.

[1] Huber. Hed. Regts., 1, 5, 37.

[2] See *Horak* vs. *Horak*, 3 S., 389; and *previous Stuprum* in Chapter on *Divorce.*

[3] Gen. xix. 25.

[4] Brown's Matrimonial Cases, pp. 90 and 149; *Walter* vs. *Rider*, and *Westacoot* vs. *Dods* in Ley's Ecclesiastical Cases, pp. 16 and 59.

[5] Van Leeuwen, 1, 14, 5.

[6] Grotius, 1, 5, 9.

(*c*) The great-grandfathers and great-grandsons in the third; and so on.

In the collateral lines the generations are taken, first up to, then down from, the common ancestor. Thus, if two people in any way related wish to ascertain their degree of relationship to each other, they should first ascertain who the common ancestor was from whom they are descended. Take, for instance, two first cousins on the father's side. From son A to his father is one degree; from A's father to the common grandfather is another degree; from that grandfather down to cousin B's father is another degree; and from B's father down to cousin B is another degree. Consequently, A stands to B in the fourth degree of relationship.

The general rule is that persons who stand in the position of ascendants and descendants, however remote—*ad infinitum*—are prohibited from marrying each other; and that in the collateral line the prohibition extends to, and includes, the third degree only; but that from the fourth degree they may marry. Thus first cousins may marry, as they stand in the fourth degree from each. There is a popular idea that, though first cousins may, yet second cousins may not, marry; but this was never anywhere the law. As the words "cousin" and "nephew" are rendered in Dutch by the same word, "neef," I have known of some awkward consequences to follow. Thus, a lady once asked, "Can I marry my cousin?" "Yes, certainly," was the answer; "why do you ask?" "Because," said she, "I am told that I cannot." "Oh, nonsense!" was the rejoinder. "You may marry him." And marry him she did; but after a time it transpired that he was a "nephew" of the lady, not a "cousin." It being whispered to her that she might be prosecuted for *incest*, she consulted the same gentleman, when he, to convince her that she might marry her "cousin," made a rough sketch of a genealogical, or family, tree, whereupon it turned out that the person she called her cousin was not her cousin, but her nephew. Now her mistake arose in this way. The word "nephew" is rendered in Dutch by "neef," and the word "neef" is rendered in English by "cousin." At her interview she never thought of, or forgot, the English

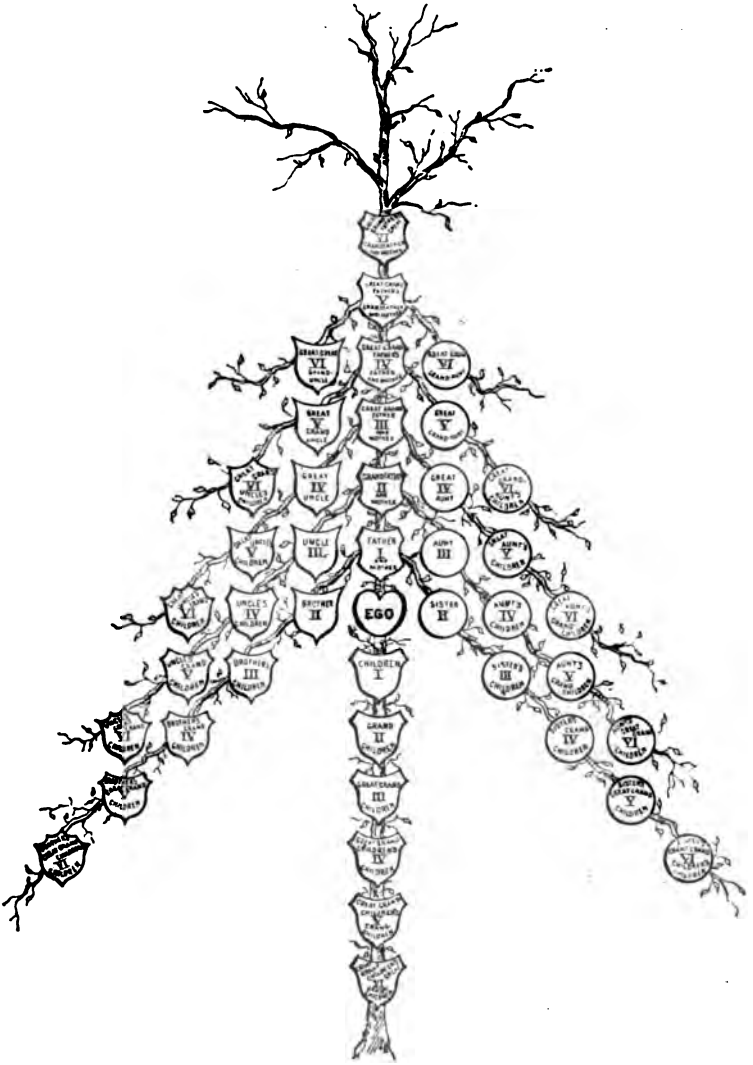
word "nephew," and, therefore, used the word "cousin," and it never occurred to her otherwise to explain the relationship. Her legal adviser was right in his advice, but she was wrong, though quite unintentionally, in her statement of the facts.

At other times, again, I have known parties to have objected, and so also have marriage-officers, to the contemplated marriages of some parties on the supposed ground of too near relationship. It is a common custom to this day, among some people, to regard all marriage connections, however remote, as relations. Thus some people call each other cousins; or second-cousins; or step-brothers and sisters; or half-brothers and sisters; or brothers- and sisters-in-law; or uncles and aunts; or nephews and nieces; or step-uncles and aunts; or step-brothers- and sisters-in-law, when in reality none of these people is in any such way related. Just to give one more instance:—A man who marries another man's sister thereby becomes that man's brother-in-law; but when two men marry two sisters they do not thereby become brothers-in-law; and yet many people regard them as such.[1] The only way, therefore, in case of doubt, or where there is reason to suppose that a person does not understand the real relationship he assumes, is to frame a genealogical or family tree, to find out whether there is any disability to marry or not. The following is a copy and translation of the family tree given in Kersteman's Woordenboek under the title "Genealogie." In this respect the Dutch law has entirely adopted the Roman, and not the Canon or Ecclesiastical law.[2] This genealogical tree will serve also the purpose in questions of *ab intestato* successions, or in regard to the disability of trusteeships in insolvent estates; and in all other questions where the relationship has to be ascertained. (*See* p. 442.)

In the same way as the relationship is pointed out here by Kersteman in the ascending line, and collaterals of ascendants, so is it also in the descending line from "Ego," and the collaterals of descendants; and those degrees, ascending, descending, and collaterals may be extended *ad infinitum.*

[1] Van Leeuwen, 1, 8, 9.

[2] Consult Grotius, 2, 27; Inst. of Just., 3, 6; Van Leeuwen, 1, 3, 8.


EGO
FATHER
I.
MOTHER
UNCLE
III.
AUNT
III
BROTHER
II
SISTER
II
CHILDREN
I
GREAT
UNCLE
GREAT
AUNT
GRAND
II
CHILDREN
GREAT GRAND
III
CHILDREN

The prohibition to marry applies to the half as well as to the whole blood.

A marriage contracted within the degrees of prohibition is entirely void, and the offspring are illegitimate, and the offending parties are liable to criminal punishment for incest or otherwise.[1] The punishment attached to the crime of incest (Dutch, "*bloedschande*"), is death, if between the ascending and descending lines; and any sentence short of death at the discretion of the Court, if between collaterals;[2] though of late years, in this Colony, the extreme penalty of the law has not been enforced. By the law of England incest is not a civil, but an ecclesiastical, offence; and is the only offence which, in England, is still prosecuted in the ecclesiastical Courts. The person committing incest is, upon conviction, directed to do penance and to be excommunicated and to be imprisoned for six months.[3]

A person who is already in the married state may not again marry; as the rule is that a man can have only one wife, and a woman only one husband, at a time. If, then, they marry while the former marriage still subsists, they thereby commit the crime of bigamy, and the marriage is void *ab initio*.[4] The punishment for bigamy is any sentence short of death, according to the discretion of the Court.[5] The innocent party is of course not punished for bigamy; and, if the woman was innocent, her children by such marriage would be legitimate.[6] By the law of England the penalty for bigamy is penal servitude for not more than seven years.[7]

The following persons may *never* marry, and, if they do so, the marriage is void *ab initio*, and the offending parties are punishable:—

(*a*) Eunuchs, or castrated persons.[8]

(*b*) Persons who are otherwise impotent, and thus incapable of procreation.[9]

[1] § 13 of Placaat of 1st April, 1580.
[2] Van der Linden, 2, 7, 8.
[3] Stephen's Crim. Law, Art. 170.
[4] Grotius, 1, 5, 2.
[5] Van der Linden, 2, 7, 3; and Van der Keessel, 62.
[6] See Chapter "*Divorce*."
[7] Stephen's Dig. Crim. Law, chap. 30.
[8] St. Matt. xix. 12 and the next reference.
[9] Grotius, 1, 5, 4; Lybrecht, 1, 12, 16.

The following persons are only under a *temporary* disability to marry:—

(*a*) Insane persons, idiots, or mad persons, during their insanity.[1]

(*b*) Persons under the age of puberty may not marry, not even with the consent of parents, until they have arrived at that age. If they do, the marriage is void *ab initio*, and they are punishable.

(*c*) A widower may not marry until three months after the death of his wife; and a widow not within five months of her husband's death, nor during the period of probable pregnancy by her former husband.[2] The prohibition to the widow is in order that the paternity of her child may not be uncertain; but if she is certain that she is not pregnant, then she may marry after five months of her husband's death.[3]

By the Roman law there could be no re-marriage during the *annus luctus*—year of mourning—and if there were, the parties were, under the old law, declared infamous; but, under the later law, it was prohibited only "for decency's sake." In Holland, in some places, the prohibition was for six months, and, at other places, in the discretion of the Judge of the Matrimonial Court; while by the Colonial Ordinance of De Mist it was declared to be the law "*om der eerbaarheid wille*" (which may be translated, "for decency's sake"), not to marry within the three or five months, as the case might be. But no penalty is attached if the parties do marry within the prohibited time; and therefore, if a widower, or a widow, should marry one minute after the death of his or her former spouse, the marriage would be legal and they could not be punished. But, of course, they could not compel any marriage-officer to solemnize the marriage before the lapse of the three or five months; yet if such officer chose to do so, he would be free from punishment. As a widower or a widow cannot compel any marriage-officer to solemnize a marriage within the prohibited periods, they are accordingly classed here under the heading of "temporary disability."

The following persons are within the prohibited degrees

[1] Grotius, 1, 5, 4.
[2] Ord. of De Mist of 1804, § 18.
[3] Grotius, 1, 5, 3.

of marriage, and may *not marry each other:* if they do so, the marriage is void *ab initio*, and they are punishable criminally for *incest*, and the children are illegitimate and can never be legitimized.[1]

(*a*) Ascendants and descendants; that is, parents and children, grandparents and grandchildren, and so on *ad infinitum.*

(*b*) Brothers and sisters whether of the whole or half blood.

(*c*) Uncles with their nieces; that is, with their brother's or sister's children or grandchildren and their descendants, *ad infinitum:*

Nor aunts with their nephews; that is, with their brother's or sister's sons, or their grandchildren or further descendants, *ad infinitum.*

(*d*) A man may not marry the blood-relation of his deceased wife; nor a woman the blood-relation of her deceased husband.[2]

(*e*) A man may not marry his daughter-in-law; that is, the widow of his son; nor the widow of his son's son, or daughter's son; nor any widow of any of his descendants:

Nor may a woman marry her son-in-law; that is, the widower of her deceased daughter; nor the widower of her son's or daughter's daughter; nor any widower of any of their descendants.

(*f*) A man may not marry his step-daughter; that is, the daughter of his wife by a former marriage; nor any of the descendants of his step-daughter;

Nor may a woman marry her step-son; that is, the son of her husband by a former marriage; nor any of the descendants of her step-son.

(*g*) A man may not marry the widow of his deceased brother; nor a woman the husband of her deceased sister.[3]

(*h*) A man may not marry the widow of any of his nephews; that is, the widow of his brother's or sister's sons; nor the widow of any of his brother's or sister's descendants.

[1] See the Placaat of the 1st of April, 1580, G.P.B., vol. 1, p. 330, §§ 5–11.

[2] By Act 40 of 1892 the former of these disabilities—marriage with a deceased wife's sister—is now legalised, but the latter disability is still in force.

[3] But for our present law see Act 40 of 1892 (*d*) *supra.*

Nor may a woman marry the husband of her deceased niece; that is, the widower of her brother's or sister's daughter; nor the widower of any of her brother's or sister's grandchildren, or their descendants.

Any clergyman, or other marriage officer, solemnising a marriage which he knows, or is presumed to know, to be between persons within the prohibited degrees of marriage, is liable to criminal prosecution.[1]

The following are *further prohibitions* under the common law:—

(*a*) A man cannot marry the woman with whom he has committed adultery; otherwise the marriage is not only void, but also criminal and punishable.[2] Nor will the marriage be allowed by dispensation; for instance, the application for dispensation of Jacobus Venborth to marry Maria Elizabeth Shaber, with whom he had had carnal connection during the lifetime of his wife Maria Krygman, and whereby she became pregnant;[3] and of Cornelius Pranzer to marry Bartje Lubbert, who had already had a child by him before his death.[4] The council would not enter into their requests for leave to marry, and therefore dismissed the petitions.[5]

Where the ceremony of marriage between two guilty persons has taken place, the Court will not come to the assistance of either of them in declaring void the alleged marriage.[6]

(*b*) Nor can a person marry his or her illegitimate child, nor have any carnal connection with any such.[7]

(*c*) Nor can illegitimate brothers and sisters marry each other.

From all the disabilities mentioned above, it ought to be gathered who can, and also who cannot, marry each other. Yet advice is more frequently sought upon the following than upon the preceding points. There is *no prohibition* among the following to marry each other:—

[1] See also the *Queen* vs. *Dempers* in 1895, not reported.

[2] Placaat of 18 July, 1674, G.P.B., vol. 3, p. 507.

[3] Vol. 7, G.P.B., p. 812; 3 Bk. 2 Tit. No. 11.

[4] Placaat 12 October, 1781; vol. 9, p. 372, No. 20.

[5] See also V. d. Keessel, 70; V. d. Linden, 1, 2, 6; Bergs. Advies Book, vol. 3, Con. 265; and Hol. Con., vol. 1, Con. 307.

[6] See *Daniels* and *Williams*, 3 J. 232.

[7] *Queen* vs. *Arends*, 1 C. T., 114.

(*a*) The father may marry the daughter, and the son the mother; or the father may marry the mother, and the son the daughter, of a prior marriage; so that in the former example the son becomes father-in-law to his own father. Thus, for instance, A had by B children *c*, *d*, *e*; F had by G children *h*, *i*, *j*, and *k*. Suppose that B and F were to die, then A might marry G, and *c* might marry *k*; or A might marry *k* and *c* marry G.[1] This rule would hold equally good in regard to the mother marrying the son, and the daughter the father, and so on *mutatis mutandis*.

(*b*) A person may marry the widow of his deceased wife's brother.[2]

(*c*) A guardian may marry his ward, after he has duly rendered an account of his administration.[3]

(*d*) Children by former marriages may marry each other, though they may have half-brothers and sisters living, the issue of the present marriage of their respective surviving parents. Thus, for instance, A had by B children *c*, *d*, *e*, and *f*; G had by H children *i*, *j*, *k*, and *l*: A and H die; B and G then marry and have children *m*, *n*, and *o*. The children of A and B may marry the children of G and H before as well as after the death of A and H, or after the re-marriage of B and G; but none of those children can marry the children of B and G. Now it is a common custom, in this country, for people in the position of B and G, after their re-marriage, to call or regard their children by their former marriages as half-brothers and sisters to each other. It is not so; they are in no way whatever related to each other, and therefore may inter-marry. But they are the half-brothers and sisters of the children of the marriage of B and G, because they are related to these latter on the side of one parent. B's children by G are related to her in the same way as her children by A: and so are G's children by her related to him in the same way as his children by H.

(*e*) Persons of different persuasions, though formerly they could not, may now marry each other, whether against the

[1] Utrecht. Cons., vol. 3, Con. 11, No. 19.

[2] Hol. Con., vol. 2, Con. 256; and vol. 5, Con. 106.

[3] V. d. Keessel, 74, and Lybrecht, Not. Ambt., vol. 1, p. 144.

wish of the parent or not. Thus Miss Smith, or Mademoiselle Molière, or Señora Cervantes, may marry Hadjie Abdol, or Elias Moses, or Jan van Zyl.

(*f*) Children of two brothers, or of two sisters, or of a brother and a sister, may inter-marry, because they are in the fourth degree of relationship, collaterally.

For the proof of marriage, in Courts of law, see Chapter "*Divorce.*"

A widower or widow, marrying again, was forbidden, by the *lex hac edictali*, to bequeath to a subsequent spouse more than the least portion given to any child of a former marriage. The object of this law, with the Romans, was to discourage subsequent marriages, and this prohibition was thought to act as a deterrent. It is surprising that this law should have remained so long in force in Holland; but it is now abolished with us, and all spouses, whether by a first or by a subsequent marriage, may bequeath their property as they please.

A subsequent marriage entered into in good faith by both parties, under a reasonable belief of the death of the former spouse, is valid, and the children are legitimate, though the former spouse should afterwards turn up. This is somewhat different from a case of "long unknown absence," mentioned in the Chapter on "*Divorce*" where a former husband could claim his wife back; the second marriage would be cancelled, but the children of the second marriage would nevertheless remain legitimate. As to the belief of the death of the former spouse the party must have some evidential proof which can go to satisfy a reasonable mind that, from the information received, in the absence of any direct and positive news of death, death might fairly be presumed. This is doubly necessary to prevent also a prosecution for bigamy. But if the parties before the re-marriage know that the spouse of both or either of them was still alive, such subsequent marriage would be void and the children illegitimate. If the woman, however, was innocent, though her husband was guilty, the marriage would also be void, but the children would be legitimate, as the mother's innocence does not prejudice the children.[1]

[1] V. d. Keessel, 64 and 65; Loenius, 78; Van Alphen, vol. 1, bk. 1, chap. 6, and bk. 2, p. 589; Lybrecht, vol. 1, chap. 12, § 17.

The marriage being completed, the wife at once takes her husband's name and rank, and shares with him the honour and respect due to him, and, if she become a widow, she retains that rank. Whatever may have been her humble birth, or however lowly may have been her station at the time of marriage, she is thenceforth treated as her husband's equal; or, conversely, whatever may be the man's humble state and the woman's noble birth or rank, she descends to his lowly rank and position, unless, as in England, by a patent from the sovereign (whether direct or made hereditary), a woman, noble, *in her own right*, marries a commoner. In this case, she still remains noble, but confers no rank on her husband; as for instance, Baroness Burdett-Coutts, who retained her title and rank on marrying a commoner—Mr. Bartlett. If she be only *noble by marriage*, then by the second marriage, with a commoner, she loses her title.[1] Though it is customary for the wife to assume the husband's surname, there is no legal compulsion for her to do so. It is one of the requirements of society; and it is to the interest of the wife herself that she should. An instance I know of, and one which argues most conclusively in favour of this custom, is the following, which occurred a few years ago to a lady in Natal, who had arrived shortly before from England to be married there. The gentleman to whom she was engaged had a young Kaffir boy in his service, who, for about three weeks before the marriage, used to carry messages and letters to Miss Jones (this was her real name), at her lodgings. About six weeks after the marriage the lady of the house where Miss Jones had stayed prior to her marriage called one morning rather early, to see the gentleman at his house on business. On asking the Kaffir boy, "*Where is your master?*" he answered, "*Massa am still in bed wid Miss Jones!*" Now any person, not knowing of the marriage, might think this answer unfortunate.

After the dissolution of the marriage, whether by death or by divorce, the woman need not, unless she please, continue her husband's name, but may resume her maiden name, or adopt any other.

[1] Consult Stephen's Blackstone, vol. 2, bk. 4, chap. 9.

Another requirement is, that the wife should live with her husband. The rule of law being that the "domicile of the husband is the domicile of the wife"; and this rule remains good, until they are properly separated; and, if she refuses to accompany or to follow him to any future domicile he may choose, it will justify him in suing for divorce on the ground of desertion.[1] Therefore any process of the Court intended for the wife, if served at the husband's residence, is good service; except in actions for divorce in case the wife has left her home, when a personal, or other, service is required.[2] But though the rule is that a husband may at will change his domicile, yet if by their antenuptial contract the parties have agreed as to their future domicile, then the husband, though he may, in case of necessity, change the domicile of himself and wife, is not otherwise to do so to the detriment of her property; or so as to render her, by the laws of the new domicile, in a worse position as wife than she would be by the laws of the domicile of the contract.[3]

The husband is liable for all debts contracted by his wife before marriage, if they are married *in* community of property; and for all necessary debts contracted by her during marriage, whether they are married in or *out* of community. He is not liable for any of her debts, if they are married out of community of property, except for necessaries after marriage. What amounts to necessary debts must depend upon their social position and means and is for the Court to decide.[4] In case of a marriage *in* community of property, the husband is always liable for the debts of the joint estate, during, as well as after, marriage. At the death of either party the joint estate must be liquidated, and if the husband should be the survivor, he would be liable for the whole of the deficiency of the joint estate, because he was its administrator during the marriage; but if the wife should be the survivor she would be liable out of her separate estate acquired after her

[1] See Chapter "*Malicious Desertion.*"

[2] See Chapter "*Summonses.*"

[3] Voet, 5, 1, 101, translated by Sampson; Wassenaar, chap. 16, no. 87; and Berg. Ned. Adv., Vol. 2, Cons. 194.

[4] See also *Mason* vs. *Bernstein*, 7 C. T., 489, and the Chapter on "*Civil Imprisonment.*"

husband's death for half of the debts of her husband. But in any such action against her there ought to be an averment in the pleadings, and proof, that the claim had been duly proved in the joint estate and not satisfied in whole or in part.[1]

If, however, the surviving wife wishes to be freed after her husband's death from half of the debts contracted by him, *stante matrimonio*, she should, before the funeral, either make a notarial act of repudiation in the presence of two witnesses, and therein renounce all her right and title to the assets and liabilities of the joint estate, and give notice thereof to the creditors, as well as notice that she has abandoned the said estate; or, she should, on the day of the funeral, being first clad in her ordinary daily costume, place the keys of the house on her husband's coffin and precede the bier out of the house.[2] There are several instances given of this act of repudiation in the Dutch law, and even among people of rank and station. Thus, the Widow Gui, of Chastillon, after the death of her husband, the Count of Blois, in 1397, renounced her right to the joint estate, and the benefits under his last will, by placing the keys of the house on the coffin and walking in front of the bier out of the house. See also the case of *De Konig* vs. *Marcus*, and *Pieterz* vs. *Widow Pieterz*, reported by Loenius in his 65th and 73rd cases, which are worth a careful perusal. The former of these cases mentions a large number of peculiar local customs in the different provinces; such as that the clothes should be borrowed, or be of the most poverty-stricken appearance; and the Regts. Geleerde Observatie mentions some other customs. But the custom to be observed by us is one or other of the alternatives above mentioned.

The wife is not liable for any obligation which may arise out of a crime committed by her husband. Thus in the case of Gerrit Delft, who forfeited a certain sum by way of penalty for manslaughter, his heirs had to repay what they had got out of the estate, *not his wife*.[3] This exemption from

[1] *Sichel* vs. *de Wet*, 5 E.D.C., 58, *Brink* vs. *Louw*, 1 M., 210; and *Faure* vs. *Divisional Council of Tulbagh*, 8 J., 72.

[2] Grotius, 2, 11, 18; V. d. Keessel, 224, Regts. Obs., vol. 2, Obs. 34; Berg. Ned. Adv. Bk., vol. 2, Con. 205.

[3] Loenius, 103; and Grotius, 1, 6, 22.

liability does not, however, apply to the debts contracted by herself.[1]

If the parties do not marry by antenuptial contract, community of property takes place of all their then existing, as well as of all their future, property, from whatever source, and however acquired, and wheresoever situate. Though one of the parties may have absolutely nothing at the time of marriage, and the other be wealthy, yet, from the moment of the completion of the marriage, their two estates are merged into one, and each, from that moment, is entitled to one-half thereof, as the community is continuous, and neither can be deprived of it except by forfeiture in an action for divorce. It is true that, during the marriage, the husband, by virtue of the *marital rights*, has the management of the joint estate, and that the wife cannot interfere with it, unless he is squandering it in such a way as to justify the Court in placing him under curatorship for insanity or prodigality; and while he, in the exercise of his discretion, can do what he pleases with the joint estate, the wife cannot. He can barter, sell, or exchange the joint estate, but she cannot. By her will, however, she can do with her half of the joint estate what she pleases, and she may make her will without his knowledge, or even against his wish; and she can, either with or against his wish, alter or cancel a will jointly made with him. But during lifetime she cannot exchange, sell, or make a present of any portion of the joint estate without her husband's concurrence. Were she to attempt to part with any portion of the joint estate, he can stop her, by virtue of the *jus mariti*, and even obtain an interdict against her; and he can reclaim, by action, from the party in possession, anything she may have so parted with. This seems hard on the wife, especially if she had an estate at the time of marriage, when her husband might have had nothing; but it should be borne in mind that she can provide against this by making an ante-nuptial contract regulating, and even keeping, the administration of her estate in her own hands. But it is harder on a husband who, after marriage, discovers that his wife was burdened with debts before marriage which he has

[1] Loenius, 73.

to pay, he being even liable to go to gaol for non-payment thereof. But here also he, like the wife in the former case, may protect himself by an ante-nuptial contract.[1] But, of course, community does not apply to *fidei commissum* which has to go to third parties after a certain period, except as regards the usufruct thereof; nor does community take place between parties who have eloped, nor in the case of a clandestine marriage of minors.[2]

A wife, married in community of property, cannot carry on a trade or a public business without the husband's consent; and, if she were to attempt to do so, he can either interdict her or obtain a judicial separation. But if she carries on such business with his consent, he is liable for her debts so contracted, equally with herself; and they may be sued jointly or severally, and be jointly or severally imprisoned for these debts.[3]

But, though, by our law, community takes place, with the exceptions above named, of *all present, as well as of all future, property and wheresoever situate*, does this apply also to the real or immovable property of spouses situate in a country where community of property is not recognised? Our law says "*yes;*" the English and American lawyers say "*no;*" and on each side the point is laboured with an amount of ingenuity which may be an intellectual treat to peruse, but the discordant opinions are positively distressing to a practitioner. The question is of frequent occurrence, and, owing to the many inter-marriages of Colonists with people from abroad, and of the continual influx of people from almost all parts of the world, but more particularly from Europe, is a very important one; and though, as regards movables, there seems no difference of opinion, the point has never yet, anywhere, been decided, so far as I have been able to trace, as regards immovable property between married spouses; except with us in the single instance of *Blatchford's* case, hereinafter mentioned, which was decided according

[1] Grotius, 2, 11, 4; v. d. Linden, 1, 3; v. d. Keessel, 47-87; Huber Hed. Regts., 1, 3, 33 and 35.

[2] Placaat of 4th October, 1540; G.P.B., vol. 1, p. 319, § 17; and Placaat of 25th February, 1751; Ibid, vol. 8, p. 535; and *Mostert* vs. *The Master*, 3 R., 59.

[3] See Chapter "*Judicial Separation.*"

to the law of the matrimonial domicile—England. All the lawyers, in all countries, are agreed, and acknowledge the rule of the civilians, that "*mobilia sequuntur personam;*" and, by virtue of this rule, they have decided that whatever rights, whether by contract or by operation of law, the parties had or acquired by the domicile of marriage, they carry with them as regards their movables present and future, wherever they may afterwards acquire another domicile; and, if they have two domiciles, then that domicile where they most frequently are or where most of their property is. All writers also acknowledge, and have adopted, the rule of the civilian's, "*lex loci rei sitæ;*" but it is in the application of this latter rule that the versatility of opinions, as to property on marriage, comes in between the English and American lawyers on the one hand and the civilians and Roman-Dutch lawyers on the other. In questions of community of property our law makes no distinction whether the property be movable or immovable: the co-partnership once formed comprehends property *wherever it is situate.* Thus in questions arising in this Colony on community of property among parties who have been married here, or elsewhere, where community of property prevails, and who have become domiciled here, the community is continuous in *all* property, movable and immovable alike. But now comes the *crux.* Suppose the parties, at the time of marriage in community of property, were domiciled here, and either had at the time of marriage, or subsequently acquired, property, real and personal, in England, would community of property be introduced as regards the property in England? Our law says "yes" as regards both. The English and American laws, though they have not the law of community, yet with reference to those countries that have the community, say "yes" as regards the movables, or personalty, but "no" as to the immovable property, or realty. All writers are agreed that, in the absence of any ante-nuptial contract, or marriage-settlement, which may contain any stipulations the parties may please to make, *the law of the matrimonial domicile of the husband (not of the wife) governs the property between the parties, wherever they may afterwards reside; but the English and*

American lawyers make the exception stated above as to the landed property in England or America. Thus suppose a gentleman domiciled in England, but on a temporary visit, marries here a lady domiciled in this Colony, the law of England prevails: upon this all lawyers are agreed, and it is also our law, as is stated further on. On the other hand, suppose a gentleman domiciled here, but on a temporary visit to England, marries a lady domiciled there; then the law of this Colony prevails. That is what, on the same principle as in the previous compact, our law says; but the English and American lawyers, while agreeing in the latter case as to the movables, make an exception as to landed property in their countries. And it has been decided in the Supreme Court of this Colony that in the case of a couple domiciled and married in England, and who subsequently changed their domicile to this Colony, where all their property was acquired, no community was thereby introduced, and that the husband could will away that property as he pleased, on the ground that, England being the matrimonial domicile, the law of that country must govern the marriage as to its incidents.[1] If, then, all laws are agreed as to the movable property, why should the English and American lawyers exclude the immovables? The universal answer is that personal property has no locality, and therefore follows the person; while immovable, or real, rights are to be dealt with by the law of the place where they are situate. But this is also the Roman-Dutch law, borrowed from the Civil law, with the addition of the former law extending the doctrine of community to all property, movable or immovable, wherever situate. Now, originally, the doctrine that movables follow the person and immovables the site, had nothing to do with the question of the regulation of property on marriage, but applied to intestate successions only. How the rules came to be extended to property on marriage we can account for only on the supposition that, in the absence of anything better or more definite, these rules were convenient to follow.

[1] *Blatchford* vs. *Blatchford's Executors*, 1 E.D.C., 365; and 1 R., 3. *Note.*—Though this case is found reported in the E.D.C. Reports, it was tried and judgment given in the Cape Supreme Court.

Now it is true that the laws of one country are not in force in another country, but still, by a universal tacit agreement, or what is more technically called "the comity of nations," obligations entered into in one country are recognised and enforced in the other. If, by an ante-nuptial contract, for instance, entered into in this Colony between two spouses domiciled here at the time of marriage, they, *inter alia*, specifically agree that their landed property, or the realty of one of them, in England shall fall into the community of property as in force in this Colony, then—though I cannot find a single case on this point—the English Courts will, I think, reasoning from general principles, recognise this contract on the ground of the "comity of nations," though proceedings, even an action, may have to be taken in England to get title to half of the real estate there.[1] If this point be once conceded, why should not the tacit contract of community, by operation of law, on marriage be also conceded? But I have now to notice a further change. What I have stated thus far, with regard to the law of England, still holds good as to those marriages contracted there *before* the 31st of December, 1882. But the law is not applicable to those women who were domiciled at the time of marriage and married in England, or Ireland, *after* the 1st of January, 1883. Thus as to the latter marriages the otherwise universal rule "that the matrimonial domicile must govern the marriage as to its incidents" is no longer in force respecting the English or Irish wife's goods, whether real or personal. In 1870 an Act was passed by the British Parliament, called the "Married Women's Property Act," which protected some of the wife's goods from the husband and his creditors. In 1874 this Act was amended and some further protection was granted; but in 1882[2] a complete revolution was made in the law of England, which affected the protection of the wife who married after the 1st of January, 1883, and secured to her all her property, personalty and realty—*i.e.* movables and immovables—in the same manner

[1] Since the first edition of this work in 1893; see the decisions of the Supreme Court in 1897 in the following cases, *infra*: *Haupt* vs. *Haupt*; *Chivell* vs. *Carlyon*, and *Brisley* vs. *Brisley*.

[2] 45 & 46 Vict. c. 75.

as if she were a *femme sole.* This Act specially excepted Scotland, and applies only to England and Ireland; but the Scotch wife had previously received some protection, by Act 44 & 45 Vict., c. 21, which gives to a married woman the separate estate in her whole movable, or personal, property, so as to be not subject to the *jus mariti*, or the husband's debts. The effect of these Acts is that no law of domicile or of marriage can affect or change the rights *to the property, in the United Kingdom, of a wife who married there since the 1st of January,* 1883. Of course those who were married before that date come, with their goods, under the old law, but are also protected as to property acquired *in the Kingdom* since that date. It will be noticed that, while the English wife and the Irish wife are protected in their immovables as well as movables, the Scotch wife is protected only in her movables. Therefore in questions we have to answer here with regard to marriage and property in the United Kingdom we must bear the above changes and limitations in view. I have not been able to find any case decided as to the effect of the doctrine of the matrimonial domicile on these Acts; but it seems to me clear that, as these Acts were framed for the protection of the wife's goods, that doctrine is no longer applicable in the United Kingdom to those who marry there after the 1st of January, 1883. Of course the protection given to the wife's property has nothing to do with the law of intestacy there, which must still be governed by that law. The English wife may now, by virtue of these Acts, bequeath her property as she pleases, and also make donations—even to her husband. But in countries where no such exclusive legislative protection has been given to the wife's property, as is now secured to her in the United Kingdom by the Acts mentioned, the law as to marriage and matrimonial domicile is still in force.

Now, in order further to illustrate these general principles, even at the risk of being charged with some repetition—for I hold it is better to repeat and be understood, both by student and by practitioner, than to be obscure and misunderstood—let us assume some cases, to shew the operation of the law as I understand it now to be:—

(*a*) Suppose that two people, domiciled and married in England or Ireland *before* 1870, afterwards became domiciled and acquired property in this Colony: the whole of their property, there and here, would belong to the husband. But suppose that they were married *after* 1870: the wife would then retain her own movables, and would from 1st January, 1883, retain, in addition also, the immovable property, there and here, acquired by her since this latter date.

(*b*) If the parties were married and domiciled in Scotland, then, up to the passing of the Act 44 and 45 Vict., c. 21, the doctrine of the matrimonial domicile would prevail, and the husband take all the wife's goods; but, since that Act, the wife would be protected in her movables. If they afterwards became domiciled and acquired property here, the wife's movables would be protected by the Act, but the immovables would be governed by the old law and be under the administration of the husband.

(*c*) Suppose an English gentleman, domiciled in England, but on a visit here, marries a Colonial lady domiciled in this Colony, then by our system of jurisprudence the English law would prevail, on the ground of the doctrine of the matrimonial domicile of the husband; and if a question as to the effect of marriage on property were to arise here with regard to property of the wife in this Colony, the Court would decide it according to the English law.

(*d*) Suppose a Cape gentleman, domiciled at the Cape, marries during a temporary visit to England a lady domiciled there, the law of the Cape would prevail, with the exception stated further on; and, according to our law, everything she has in England, personalty and realty, and everything she has in this Colony, movables and immovables, would, in the absence of an ante-nuptial contract to the contrary, form part of the community of property between them. But now, as stated above, the Act of 1882 would keep out of the community the property, real and personal, *in England and Ireland*, of those who have married there since 1st January, 1883; but whatever property the wife may acquire in her new domicile would fall into the community, on the ground that the domicile of marriage of the husband governs such

property. I can shew no English decisions on this point, but I gather this from general principles.[1]

(*e*) Suppose that two persons, domiciled and married in community in this Colony, afterwards remove and become domiciled in England or Ireland and acquire property there also, all their respective properties there and here, movable and immovable, would, by the principles of our law, be in community; but here again English law steps in and, up to 1870, says "yes, as to the movables in England you can do "what you please, but as to the immovables the *lex loci rei* "*sitæ* prevails, and there is no community." But, since the Act of 1882, the wife's property, real and personal, acquired in England or Ireland, is excluded from the husband's control; so that the wife may enjoy all the Colonial property of her husband and herself in community, and retain her English or Irish property free from his control. If they should afterwards resume their former domicile in this Colony, the same rights would remain. Since the 1st Edition, in 1893, our Supreme Court decided (in 1897) that where two persons domiciled in this Colony at the time of their marriage, and the husband afterwards bought land in England during the subsistence of the marriage, such land falls within the community of property created by the marriage, whether they retain their domicile of marriage or afterwards change it to England.[2]

By the law of England, until 1870 marriage operated as an absolute gift to the husband of the personalty in possession of the wife in her own right, whether belonging to her at the date of her marriage or coming to her afterwards; and, as to her realty, he enjoyed it during life; and after his death it went to their children. In the marriage service of the Church of England the bridegroom is made to say to the bride: "With all my worldly goods I thee endow," but, until 1870, the wife endowed the husband, for he could do with her property what he pleased, while she was helpless and had to submit. But it is to be observed that these new Acts refer

[1] Since the first edition of this work in 1893 see the decisions of our Supreme Court in 1897 in the following cases: *Haupt* vs. *Haupt*, 7 C. T., 49; *Chivell* vs. *Carlyon*, Ibid, 83; *Brisley* vs. *Brisley*, 11 C. T., 321.

[2] *Chivell* vs. *Carlyon*, 7 C. T., 83; *Brisley* vs. *Brisley*, 11 C. T., 321; and *Haupt* vs. *Haupt*, 7 C. T., 49.

only to women who get married *after* the passing thereof: thus, those who were married before 1870 still come under the operation of the old law, which gives the husband everything and the wife nothing. Of course, both in England and here, these unequal incidents of a marriage may be guarded against by making an ante-nuptial contract regulating the property of the parties; but poor people do not generally think, or cannot afford the expense, of a pre-nuptial contract, while some wealthy people have a prejudice against it.

While endeavouring, on one occasion, to explain these incidents of the Colonial and foreign laws on marriages to a client who has children, married and domiciled in England, Scotland, Melbourne, Natal, and in this Colony, and who is himself an Englishman, and was married at the foot of Mount Ararat to his mistress' maid—who was a German—he exclaimed, "*Devil of a mess them laws is!*" Instantly feeling somewhat guilty by reason of the remark (though some people say "Lawyers have no conscience"), I thought it was more likely that *I* was in a "devil of a mess," or at any rate foggy, upon the subject; and I have, therefore, frequently since reconsidered every point here mentioned, but have gained no new or different light.[1]

With the exceptions, then, of the opinions of the English and American writers as to the operation of the marriage laws in their countries, the doctrine of the civilians, and of the Roman-Dutch law, as pointed out above, is still in force, and is applicable to all other countries where no special change has been made such as in England.

A marriage contracted according to the *lex loci* is valid all the world over, although either or both of the parties may

[1] For these general principles, consult Story's "Conflict of Laws," Chaps. 4, 5 and 6; Burge's "Colonial and Foreign Laws," vol. 1, Chap. 7, pp. 262–332; and 462–560; Hol. Cons., vol. 3, Con. 4; and vol. 4, Con. 22; Berg's Ned. Adv. Bk., vol. 2, Cons. 207 and 208; and vol. 3, Con. 113; Regts. Obs., vol. 3, Obs. 37; Huber, Hed. Regts., 1, 3, 9; Voet, 23, 2, 85; *Blatchford* vs. *Blatchford's Exers.*, 1 E.D.C., 365; and 1 R., 3; *Black* vs. *Black's Exers.*, 3 J., 200; and *Van der Byl* vs. *Van der Byl*, 5 J., 170; Phillimore on Domicile, Chaps. 2, 3, 4, 5 and 9; Stephen's "Law of England," vol. 2, Bk. 3, Chap. 2; Conybeare and Andrews' "Married Women's Property Act;" Savigny's "Treatise on the Conflict of Laws," translated by Guthrie, § 36; Westlake's "International Law," Chap. 11; Foot's "Private International Jurisprudence," Chaps. 2, 3, 4; Dicey on Domicile.

have, in order to evade the effect of the marriage or the laws of his or their own country, gone to another country to contract and celebrate their marriage there. Suppose then that a man wanted to marry his deceased wife's sister before the change hereinbefore mentioned was made: though the law here forbade it, he may marry her where the law allows it; for instance, either in the Orange River Colony, or in Australia, or in Germany. The English Courts formerly thought likewise, but of late years held differently; and though, in *Bethell's* case, his marriage with a Kaffir woman, in Stellaland, was not recognised by the Courts in England, it was on the ground that, although he might on the same day, if so disposed, have contracted a proper marriage in a church on the spot, he preferred to go through the Kaffir ceremony of a polygamous marriage, and polygamous marriages are not recognised in countries where the law allows a man only one wife.[1]

NOTE.—Though nearly ten years have elapsed since the first sentence of this paragraph first appeared in print, I have seen no cause to change the principle it enunciates. If I had given my reasons then, there would have been no necessity to do so now, but I had to keep in view that I was giving only general principles of law and practice, and that by giving one's reasons for every theory advanced would have swelled the book to an undesirable extent. Even now, in complying with the request of several of my reasons, I shall be as brief as possible.

The conflict of law on the subject has arisen through the opinion of Huber in his work called the *Prælectiones*.

The writers on the law of the Province of Holland who have adopted his views have not borne in mind the country whose law upon the point he was supposed to give. Huber ostensibly comments on the Justinian Code; but wherever he refers to Roman-Dutch law he does so to the law of the Province of Friesland, of the Supreme Court of which he was at one time a member. After commenting on the 3rd Title of the 1st Book of the Digest of Justinian, he puts in a special chapter between that and the 4th Title, and calls it *De Conflictu Legum*, a subject not contained in the Justinian Code. The greater part of this special chapter contains only general principles which are not in controversy among jurists anywhere, but the 8th Section thereof, which is the cause of all the subsequent discord among other writers, is as follows:—

8. Matrimonium pertinet etiam ad has regulas. Si licitum est eo loco ubi contractum et celebratum est,	8. Matrimony is also affected by these rules. If a marriage is lawful in the place where it has been contracted

[1] *Bethel* vs. *Hildyard*, 58 L. T., 674.

ubique validum erit effectumque habebit, sub eadem exceptione, praejudicii aliis non creandi; cui licet addere, si exempli nimis sit abominandi; ut si incestum juris gentium in secundo gradu contingeret alicubi esse permissum; quod vix est ut usu venire possit. In Frisia matrimonium est, quando mas et foemina in nuptias consenserunt et se mutuo pro conjugibus habent, etsi in Ecclesia nunquam sint conjuncti. Id in Hollandia pro matrimonio non habetur. Frisici tamen conjuges sine dubio apud Hollandos jure conjugum, in lucris dotium, donationibus propter nuptias, successionibus liberorum, aliisque fruentur. Similiter, Brabantus uxore ducta dispensatione Pontificis in gradu prohibito, si huc migret, tolerabitur; at tamen si Frisius cum fratris filia se conferat in Brabantiam ibique nuptias celebret, huc reversus non videtur tolerandus; quia sic jus nostrum pessimis exemplis eluderetur, eoque pertinet haec observatio: Saepe sit, ut adolescentes sub curatoribus agentes, furtivos amores nuptiis conglutinare cupientes, abeant in Frisiam Orientalem aliave loca, in quibus curatorum consensus ad matrimonium non requiritur, juxta leges Romanas, quae apud nos hac parte cessant. Celebrant ibi matrimonium, et mox redeunt in patriam. Ego ita existimo, hanc rem manifesto pertinere ad eversionem juris nostri; ac ideo non esse magistratus heic obligatos, e jure gentium, ejusmodi nuptias agnoscere et ratas habere. Multoque magis statuendum est, eos contra jus gentium facere videri, qui civibus alieni imperii sua facilitate, jus patriis legibus contrarium, scientes volentes, imperiuntur.

and celebrated, it will be valid everywhere and have effect, subject to the same exception of not prejudicing the interests of others; to which we may add a caution against any excessive instance to be shunned, as for instance, if incest should happen to be allowed anywhere in the second degree of international law, a contingency which is scarcely possible. In Friesland marriage takes place, when a man and woman have consented to wedded life and regard each other as spouses, even though they have never been united in a Church. In Holland that is not regarded as marriage. Yet there is no doubt that Frisian spouses will enjoy among Hollanders conjugal rights in respect of gains from dowries, gifts on account of weddings, succession of children, etc. In the same way a Brabantian, when he has married after a Papal dispensation in a forbidden degree of affinity, will, if he should come hither, be acknowledged; but yet, if a Frisian were to repair with his niece to Brabant and there celebrate his wedding, he would apparently not be acknowledged on his return here. The reason is that in this way our law would be evaded by scandalous instances; and the following remark applies in the same direction: It often happens that young people, while under the care of guardians, wishing to cement in marriage their clandestine intrigues, go off to East Friesland or other parts, where the consent of guardians before marriage is not required as it is by the laws of Rome, which among us remain void in this respect. They celebrate their marriage there, and shortly afterwards return to their own country. I am of opinion that this clearly pertains to the subversal of our law, and therefore that magistrates here are not bound by international law to recognise and ratify marriages of that description. Far rather should it be laid down that those appear to be violating international law who knowingly and willingly allow citizens of a different jurisdiction to share through their own compliance in a usage contrary to the laws of their country.

It will be seen that Huber cites no author, law, or custom, as indeed there were none, for his conclusions. He is the first writer who advanced such a view. His work was published in August, 1678. Now the union of the Provinces of Holland took place on the 29th of January, 1579. It

was one of the articles of the confederation that each of the seven Provinces should retain the laws it had at the date of the Convention, and that whatever new statutes were passed by the States should be applicable to all the Provinces unless specially excepted. On the 1st of April, 1580, a placaat was passed in the Province of Holland regulating the marriage laws. There is a reference in it, as also there was in a previous placaat, that marriages might be entered into without the religious ceremonies previously required; in short, thenceforth treating a marriage as a civil contract, and ever since then marriages in Holland have been regarded as in no better or worse, or in any other light than a *civil contract.* There was and is not in any part of the seven Provinces of the Union a law to the effect of Huber's opinion, and if there was a custom to that effect in Friesland Huber would have said so. At least, I have not been so fortunate as to find any, and it is a singular fact that as it was an important subject affecting all the seven Provinces there was no legislation on it.

The writers who have followed Huber have done no more than he did, but even they are not all agreed, as we shall see further on.

Moreover, Huber, in the same chapter concerning the disabilities to marry among those who go to another country for that purpose, included minors without the consent of their guardians, and declared that if such were to marry the marriage would be void *ab initio.* Now in the Province of Holland it was also the law that a minor could not marry without the consent of his guardian, but nevertheless if he did so the marriage would not be void, but perfectly legal, and so also has the Cape Supreme Court decided. Voet (23, 2, 4), though he does not quote Huber, must, when he wrote, as appears from internal evidence, have had before him the extract quoted above of Huber's work. He admits the law is in doubt and that several writers have held opposite views. He inclines, however, to the view of Huber, and bases his opinion on the single ground that "*because the banns have not been published as required by statute.*" In another part of the same chapter of Voet he admits that the marriage of minors without the consent of their guardians was lawful. Now as the publication of the banns is only a "formality," it follows that it is not absolutely necessary to the validity of a marriage, and instances are mentioned by several writers on the Roman-Dutch law of marriages having taken place and been held valid where no banns were published.

The only objection which writers can advance against a marriage forbidden in one country but lawfully contracted in another is because it is *in fraudem legis.*

But what is the value of such an objection? If a party does an act in order to avoid a law, then why not punish him? If it is admitted that because he married in another country he cannot be punished, then what is the good of holding forth the useless expression *in fraud of law?*

It will be noticed that Huber applies the disability of a marriage forbidden in one country but lawfully celebrated in another to only two causes—(*a*) minority; (*b*) incest. Now Voet mentions only one, viz.,

the want of the publication of the banns at the domicile of the parties. I have already stated above what he says of the marriage of minors. He does not mention incest; and neither Huber nor Voet says anything about polygamy as a disability under such circumstances. Verily when doctors differ, etc.

Van der Linden, in his Laws of Holland,[1] says: "Although examples are to be found during the Government of the former States of marriages allowed by dispensation between persons who by law were prohibited from marrying, still such cases were rare, and the rule of law was not lightly departed from. *But after the year* 1795 *the dispensations became more numerous even among persons within degrees which would formerly not have been thought of.*"

The "Regtsgeleerde Observatien," a joint work of a society of eminent jurists in the 18th century on controversial and doubtful points of law, gives several examples[2] of the strictness of the law of marriage as it was between 1670 and 1795 having been done away with. All the above facts were known to me when I wrote the paragraph in question of the first edition of this work, and I will now briefly sum up the conclusions.

1st. In the early days of Holland marriage was a sacrament, but for the last 325 years it has been only a *civil contract.*

2nd. Now Huber, in the same chapter—*De Conflictu Legum*—admits, and so also do all the writers since then and in all civilised countries, that "*A contract is governed by the law of the place where it is made, and if valid there it is valid everywhere else.*"

3rd. People prohibited to marry at the place of their domicile marrying elsewhere in a *civilised* country where the marriage is lawful cannot be prosecuted criminally in either country for such marriage.

4th. But in saying that such a marriage is lawful, the exception is (this I ought to have added to the first edition) polygamous and incestuous marriages, for these are not recognised by civilised nations. "Incestuous," not in the extensive sense of the ancient canonical law, but only in the ascending and descending line and in the first degree collaterally, that is, between brother and sister. This is the effect of the dispensations and of the later law of Holland, as mentioned by Van der Linden above. For we have seen how the Popes on the one hand and the States of Holland on the other hand granted dispensations in otherwise prohibited marriages.

I ought, perhaps, to stop here, but owing to the importance of the subject, and as the English law is frequently quoted in this country, I will say a few words on the latter law.

In England at one time the Courts have held the same view as I have enunciated. There were the numerous Gretna Green marriages, where people who could not intermarry in England and Ireland went for that purpose to Gretna Green, where they were not prohibited, and returned home immediately after the ceremony. So also in the case of

[1] Juta, tr. p. 18.

[2] Bk. 4, Obs. 1–9.

Dalrymple vs. *Dalrymple*, decided in 1811; *Swift* vs. *Kelly*, decided in 1835; and *Sinonin* vs. *Maillac*, decided in 1860, and several others.

These decisions are at least clear and free from doubt, but the later decisions, *contra*, especially those since 1861, when the Courts began with some new and doubtful theories, and to distinguish between *capacity* and *form*, are in some points doubtful, in others controversial, and on the whole unsettled. This is apparently owing to the leaning of the Courts towards the old ecclesiastical view of the question. Take, for instance, the cases of *Brook* vs. *Brook* decided in 1861, *Sottomayor* vs. *De Barros* decided in 1877, and several later ones. These judgments are full of learning and research, but they are amazingly difficult to reconcile with former decisions and with each other. They speak of the sacredness of Christian marriages, yet the law allows Jews and Christians, and all denominations, creeds, and classes to intermarry. They speak of marriage being a sacrament, yet the law allows marriages before a civil officer, the Registrar of Marriages, unaccompanied by any religious ceremony, or a word of religion—in other words, it is a *civil contract.* They speak of the awful calamity of an incestuous marriage, yet incest is not a crime and not punishable by the civil or criminal Courts of England. It *is*, however, punishable where the Roman-Dutch law is in force. They declared void in England the marriage between two persons domiciled in England, but who went to another country and married there where the law allows it; yet they declared valid in England the marriage between two minors in France which was void *ab initio* by the law of that country; so also the marriage void *ab initio* between first cousins by the law of Portugal, where it took place, they declared valid in England because one of the parties was domiciled in England at the time. They have not yet decided the effect of a marriage prohibited in England where the man is domiciled if the woman were domiciled there also, but who happens to be domiciled in Germany where the marriage took place and is valid by the law of that country, but the tendency is, or rather the implied *dicta* are, to approve of such a marriage.

It is very much to be regretted that the law in England on the subject is so uncertain and conflicting, for we are accustomed to look to the decisions of England's great Judges for guidance and instruction on many points of law, especially on doubtful or controversial subjects.

And the unsettled state of the law is very embarrassing to a British subject who, it may be, in perfectly good faith, marries in one of the Colonies, where the marriage is lawful, only to find on his return to his domicile in England that his marriage is not there recognised because not legal by the law of England, that his children are consequently bastards by the law of England, and that for the same reason they are debarred from the right of succession in certain cases.

It is therefore of equal consequence to see that one rule should be observed by all civilised countries, and that in this respect the rule of the majority of the civilised nations should be followed, viz., that a marriage lawful at the place where it was celebrated should be so recognised

everywhere else; the only exception to such a rule should be marriages involving incest in the first degree, and collaterally between brothers and sisters, and polygamy.

A rule of law in marriage is that "gifts between a husband and wife are void." This seems to many women a more surprising doctrine than that they cannot sell or exchange any part of the joint estate. "What!" said an extravagant lady once at a meeting of her husband's creditors, "must I give up all the jewellery, the carriage and horses, and costly wearing apparel my husband gave me?" "Yes," was the Master's—the late Mr. John Stuart's—soft reply, but, after a short pause, he most politely added "excepting, of course,—er—I mean not *all* your wearing apparel, you know, you can keep only necessaries suitable and sufficient under the present circumstances." He was right.[1] But while the law forbids gifts between spouses, no one but a creditor has the right now-a-days to set such donations aside. Formerly children could also object, if they could prove that their legitimate portions were materially affected by such gifts; but, now that freedom of testamentary disposition is introduced, and the *lex hac edictali* is abolished, they can no longer object. Gifts between spouses must now therefore be treated as voidable, but not as void *ab initio*. So long then as all creditors are paid, no one can complain; and if all creditors have previously been paid, the gift is confirmed by death. It does not matter how many years before insolvency the gift was made; it is sufficient if it can be proved that it was made at any time after the celebration of the marriage, to make it voidable on insolvency or on the execution of a writ in satisfaction of a judgment.[2] In saying that "gifts between spouses are void," this includes also the product or usufruct thereof, or what has been substituted therefor, and so severe was the old law on this head that if a man had by ante-nuptial contract settled a life policy on his wife, and paid the premiums thereon, his creditors could, any

[1] Consult §§ 98 and 99 of Insolvent Ord.

[2] V. d. Linden, 1, 3, 5; Grotius, 3, 2, 9; *Hall* vs. *Hall's Trustees*, 3 J., 3; *Union Bank* vs. *Spence*, 4 J., 339; *Van der Byl's Assignees* vs. *Van der Byl*, 5 J., 170.

number of years thereafter, nevertheless claim the policy or its proceeds or value, on the simple ground that, as the husband, by his means, kept the policy alive, his creditors ought to have the benefit of it and not the wife for whom the benefit was really intended.[1] But by the Ante-nuptial Contract Act, No. 21, of 1875, the law as regards the premiums paid has been altered; and the fact of the husband now paying the premiums on a policy thus previously settled on his wife does not entitle the creditors to claim the policy, or its value. By Act No. 13 of 1891, §§ 16–23, a further privilege has been extended to husband and wife, who may now, even after marriage, benefit each other by a life policy to the extent of £2,000. But with the two exceptions in these two Acts, the rest of the law as to the prohibition of donations between spouses is still in force.

By the law of England, however, a husband may make a post-nuptial settlement on his wife, provided it be not done with the view to defraud creditors who may have claims existing at the time of the settlement;[2] also a husband and wife may make gifts to each other, which are clear and irrevocable, provided they do not injure thereby any creditor in his then existing claim.[3]

In questions of Divorce the English wife is distinctly at a disadvantage as compared with her Cape sister. In this Colony, the simple act of adultery or malicious desertion on the part of either husband or wife entitles the other to a divorce. Not so in England: there, though a single act of adultery on the part of the wife entitles the husband to a divorce, yet the act of adultery on the part of the husband must either be an incestuous adultery, or be accompanied with cruelty to the wife, or desertion for two years, or bigamy with adultery, or rape, or an unnatural offence, in order to entitle the wife to a divorce. It seems hard on the English wife that she and her husband are, in this respect, not on an equal footing, and that she cannot rid herself of an immoral husband so long as he is not also guilty of one or other of

[1] *Trustee of Chiappini* vs. *The South African Association*, B. for 1879, p. 143.
[2] *Holmes* vs. *Penny*, 3 K. and J., 90.
[3] Conybeare and Andrew on the Married Women's Property Act, 2nd ed., pp. 40, 41.

the additional offences mentioned. This doctrine of the English law is borrowed from the Roman law, and was founded on the assumption that by a wife's adultery she might conceive and thus bring strangers into the family; whereas by the husband's adultery this was not so. Hence the great latitude allowed to a husband domiciled in England. But such a husband does not necessarily carry this freedom with him to whatever part of the world he may afterwards settle in. Whatever may be the matrimonial licence allowed him in England, if he and his wife afterwards settle and become domiciled in this Colony and he commits adultery here, she will be entitled to an action for divorce on the ground of his simple adultery; and so if a Cape husband were to be on a visit to England and were to commit adultery there, his wife would be entitled to bring an action here for divorce on the simple ground of adultery. But if he were married here, and afterwards became domiciled in England and committed adultery there, she could not sue him there for a divorce on the simple ground of adultery; and similarly, if the English husband were to be on a visit to this Colony and should commit adultery here, his wife could not sue him in England for divorce on the ground of adultery alone. Thus, while the English wife gains a matrimonial privilege by becoming, with her husband, domiciled in this Colony, the Cape wife loses this privilege by becoming domiciled with her husband in England. But the wife, whether English or Cape, and wherever she may commit adultery, whether at the place of her domicile or abroad, or while travelling, is liable to be sued by her husband for divorce, but he should bring this action at the place of his domicile and not in the country where the adultery was committed. There are many conflicting authorities on the point; some holding that the action might be brought against the wife where the adultery was committed, but the modern tendency is that he can only do so at his domicile. Of course if the wife does not object to the jurisdiction of the Court, then there can be no objections to trying the case in the country where the offence was committed. Officers and men of the United Kingdom in the Army and Navy retain, by Act of Parliament, their domicile

in England, no matter what part of the world they may go to, or how long they may be away; and therefore, if their wives were to sue them for divorce in any Court out of the United Kingdom, they could plead that such action should be instituted in England. Of course, where they do not make this defence the Colonial Courts may entertain the actions.[1]

A peculiarity of the law of marriage in England was, but is not so now, that a husband could beat his wife with a stick not thicker than his thumb—a privilege which many husbands both there and here still assume and would like to enjoy uninterruptedly. Perhaps this was also derived from the Roman law "*flagellis aut fustibus.*"[2] But now the law in England and here is, that neither spouse has the right to beat the other; and if he or she should do so, the accused is liable to a criminal prosecution for assault, and is punishable like others who commit an assault.

In England, as well as here, a wife who commits a crime in conjunction with her husband is presumed to act under his command or influence, and is, therefore, not punishable. Thus it has happened that, where a jury has found both husband and wife guilty of a crime, the Court has set aside the verdict as regards the wife, and has released her on the ground of the husband's presumed coercion. But there must be some evidence to shew, or the surrounding circumstances must justify the conclusion, that the wife acted under her husband's command or influence. It is thus entirely a question of fact, whether from her conduct in, and the manner of, her committing the crime, she can be presumed to have been influenced by her husband.[3]

By our law a husband or wife cannot be indicted for a theft committed by the one upon the other;[4] but by the English law he or she is now indictable "only when the one has left and robbed the other."[5]

In all civil cases a wife or husband can be compelled to

[1] *Newbury* vs. *Newbury*, quoted in *Reeves* vs. *Reeves*, 1 M., 244; *Hawkes* vs. *Hawkes*, 2 J., 109; Brown's "Matrimonial Cases," pp. 75 and 77; Story's "Conflict of Laws," § 230, a–e.

[2] Nov. 117, c. 14.

[3] *The Queen* vs. *Baker*; and *Ibid* vs. *Farley*, 2 J., 9 and 227; see also Stephen's Dig. Crim. Law, Art. 30, and Appendix, p. 366.

[4] Consult also, *The Queen* vs. *Van Vliet*, 2 C. T., 211.

[5] §§ 12 and 16 of Married Women's Property Act of 1882.

give evidence for, or against, each other;[1] while in criminal cases they are competent but not under compulsion to give such evidence.[2] But, whether in a civil or in a criminal case, husbands and wives are privileged from answering questions, or from making disclosures, as to their inter-communications during marriage;[3] and this privilege continues even after divorce.[4]

As a general rule, in the absence of any pre-nuptial stipulation, the husband has the control of the education, religious and otherwise, of the children; but the wife's wishes should also be consulted, and, if neither will give way in the matter, it is then in the discretion of the Court, as Upper Guardian, to decide what, under all the circumstances, will be the best for the children. I have searched in vain for any specific authority on this point, but I have arrived at this conclusion from the general principles of our law and those relating to the duty of both parents to their children; and also from the analogous case mentioned at the beginning of this Chapter, where in the marriage of a minor child the consent of both parents is required, or, if they be not unanimous, reference has then to be made to the Court for a decision.[5] Where there has been an ante-nuptial undertaking by the spouses as to the education or religion of their children, this must be given effect to; as any ante-nuptial agreement, so long as it is not *contra bonos mores*, or to the detriment of a third person, is valid and can be enforced. In England, however, it has been decided that a husband may disregard his pre-nuptial agreement with his wife as to the children's religious education, and change and direct it from time to time as he may wish. This is manifestly unfair, and is virtually upsetting to some extent an ante-nuptial arrangement, inasmuch as had it not been for the stipulation regarding the religious education of the children, the woman would probably never have entered into the marriage at all.

Since the first edition in 1893 the Court of Appeal in

[1] § 2 of Act 4 of 1861.
[2] § 3, Ibid.
[3] § 4, Ibid.
[4] § 19 of Ord. 72.
[5] See also van Leeuwen, Vol. 1, Bk. 1, Chap. 13, §§ 7–9, and Hol. Con. 5, Con. 189.

England has decided[1] that "the dominant matter for the "consideration of the Court is the welfare of the child. . . . "The welfare of the child in the largest sense of the word is "to be considered." This decision has thus somewhat altered and bettered the previous rigorous decisions of the English law as regards the husband's wishes even in opposition to his own pre-nuptial arrangements.

Summons for jactitation of marriage.

(Heading.)

Command A.B. of . . . . &c., to answer C.D. of . . . ., in an action wherein he complains that she the defendant did in and about the month of . . . . at . . . . and in divers other places wilfully and without the authority of the plaintiff boast and assert that she was his wife: to have it declared that she is in no wise the wife of plaintiff, and was not at the time of such boasting.

That as the said defendant refuses to desist from boasting and asserting that she is the wife of the plaintiff, a decree of perpetual silence may be enjoined on the defendant.

As it is said, &c.

Petition by a minor to marry, where the father withholds his consent.

To his Honour . . . .

Chief Justice of the Colony of the Cape of Good Hope.

The petition of A.B. of (Cape Town) humbly sheweth :—

1. That your petitioner made a proposal of marriage to C.D. and was accepted by her.

2. That the marriage will be a proper one, and that your petitioner is desirous of marrying the said C.D., but that your petitioner's father E.F., who is against the marriage, unreasonably and improperly withholds his consent thereto.

3. That your petitioner is a minor of the age of . . . . years, and by reason of his father's refusal aforesaid, requires the consent of your Lordship.

(If an antenuptial contract is to be executed, then state it and ask for a curator as in the next form.)

4. Wherefore, your petitioner prays that your Lordship will be pleased to examine into the proposed marriage and to grant an order that the said intended marriage is proper and may be solemnised forthwith.

And your petitioner, as in duty bound, will ever pray.

(Signed) A.B.

(*Affidavit of Verification.*)

[1] *Reg.* vs. *Gyngall and Hansen*, 69 L. T., 481.

Petition by a minor to marry, when his parents are absent from the Colony.

To his Honour . . . .

Chief Justice of the Colony of the Cape of Good Hope.

The petition of A.B. of Cape Town humbly sheweth :—

1. That your petitioner came to this Colony in the month of . . . . 19 . . . . last past as a (nursery governess) in the family of C.D.

2. That your petitioner's parents reside at . . . . in the county of . . . ., ... (England).

3. That E.F., of . . . ., has made a proposal of marriage to, and was accepted by, your petitioner.

4. That your petitioner is a minor, of the age of . . . . years.

5. That the marriage will be a proper one, and that your petitioner is desirous of marrying the said E.F., but by reason of the absence aforesaid of your petitioner's parents from the Colony, their approval cannot be obtained, and that the consent of your Lordship to the said marriage will therefore be required.

(If the party intends to execute an antenuptial contract, then add this clause) :—

6. "That your petitioner intends to execute an antenuptial contract with the said E.F., but requires the assistance of a curator, and that G.H. is a fit and proper person for that purpose."

Wherefore (conclude with prayer as above and add to it :—) "And that your Lordship may further be pleased to appoint the said G.H. as curator to assist your petitioner in the execution of the antenuptial contract."

(*Affidavit of Verification.*)

CHAPTER XXVIII.

JUDICIAL SEPARATION, A MENSÂ ET THORO.

JUDICIAL separation was not in force under the Roman laws, simply because by those laws divorces could be granted for any cause, however trivial, and therefore there was no necessity for any separation where the marriage tie could be so easily dissolved.[1] But the introduction of judicial separation *a mensâ et thoro* is to be traced to the canon law of Rome, and was introduced there by the clergy, which only dissolved the obligation of the parties to "sleep and live together" in common.[2]

Hence the canon, or ecclesiastical, law had not in Rome, nor has it anywhere else to this day, any force in opposition to, or in conflict with, the civil or common law of the land, and therefore no one was, or now is, bound by any ecclesiastical law which is contrary to the common law of the land; his obedience to it in such case was, and is now, merely a matter of conscience, which no Court of law could enforce. It must be for this reason, therefore, that in Holland the subject of judicial separation was specially legislated upon by the 92nd section of the Placaat of the 18th March, 1656,[3] which is as follows:—

"All evil conversations and bitterness, which are frequently the cause of abandonment and desertion of each other, shall, according to the circumstances of the case, be punished by a duly-qualified Judge, after enquiry held, by a money fine, imprisonment, or otherwise, according to law.

* * * * * *

"If the domestic troubles should become excessive, and last long, and the above-indicated judicial remedies should be of no avail, the Court

[1] See Chapter "*Divorce.*"

[2] Colquhoun's Roman Law, §§ 640 and 641.

[3] G.P.B., Vol. 2, p. 2445.

may grant a decree of separation from bed, board and cohabitation, but not of the marriage tie, with the object ever in view of the parties uniting again."

The subject being thus legalised in Holland, there is no doubt that in the interpretation of it the Courts were largely influenced by the opinions of the original authors, the Canonists. The first part of this Placaat has fallen into disuse by reason of a contrary custom in Holland, but the latter part is still the foundation of our law.

It will be noticed that by the canon law, as well as by this Placaat, reference is made only to a separation of "bed, board and cohabitation," and not to a "division of the property." The reason is simply this, that as by the Roman law there was no community, and the property of the spouses was always kept separate, the canon law could not affect it, and so was it formerly also in Holland. In course of time,—the exact date is not certain, but it was before the passing of this Placaat,—*community of property was introduced by custom into Holland*;[1] and similarly after the passing of the said Placaat, when a separation *a mensâ et thoro* was applied for between parties who were married "in community of property," practice and custom introduced the application for also a separation of the property held "in community." There are many other points, not touched upon by the Placaat, which are in force with us, which are derived either directly from the canon law (and which obtained the force of law by practice and custom), or by interpretation.

In order to maintain this action for judicial separation, "lawful reasons must be set forth *which make living together dangerous, or at least intolerable* (ondraaglyk)."[2]

The "lawful reasons" depend upon what the Court would regard as "dangerous" or "intolerable." As a general rule, therefore, for all causes for which a person can obtain a divorce he can instead, if he likes, sue for a judicial separation.[3] There are various reasons why some parties prefer to sue for a judicial separation instead of for a divorce, the most frequent

[1] Regts. Obs., 2, 32.
[2] Van der Linden, 1, 3, 9.
[3] Hol. Con. 3, Con. 342.

being to prevent the sued party from marrying again, and, in case of a wife suing, to compel her husband to support her; neither of which objects can be effected by a dissolution of the marriage. What amounts to "dangerous" or "intolerable" is very much in the discretion of the Court, which must be satisfied whether the conduct of either party to the other can be said to amount to "danger;" or, considering their habits and customs, education, rank and social positions, whether the conduct of the one to the other can be said to be "intolerable:" for what is intolerable to a person of refined feelings and of education may not be so to an uneducated person, or to one of coarse or vulgar habits.

In illustration of this principle, a few examples of what has been held to be "dangerous" or "intolerable" must here suffice:—

(*a*) Being in danger of one's life, through the acts, threats or conduct of the other.[1]

(*b*) Personal violence to each other.[2]

(*c*) Any ill-treatment or reasonable apprehension of bodily injury, or injury to health from any intimidation. In the case of *Goldsworthy* vs. *Goldsworthy*,[3] the Court held that where an ill-treatment by itself is not sufficiently serious to entitle a wife to a decree of judicial separation, it would, if accompanied by habitual intemperance, entitle her to such a decree, and give her the custody of the child: and so also in the case of a wife's habitual intemperance.[4]

(*d*) Cruelty to each other, though the guilty spouse offers security not to do it again.[5] As to what amounts to cruelty, and the different acts coming under that heading, there are many examples given in the English law, and which will serve as a useful guide to us in similar questions.[6] In an English case, before the House of Lords, Lord Stowell remarked that

"in general when married people understand that they must live together
". . . they learn to soften by mutual accommodation that yoke which

[1] Huber, Hed. Regts., 1, 6, 14.

[2] *Van den Berg* vs. *Van den Berg*, 1 M., 241; *Van Niekerk* vs. *Van Niekerk*, 14 S. C., 178.

[3] 3 C. T., 134.

[4] *Poggenpoel* vs. *Poggenpoel*, 8 C. T., 36, and 15 S. C., 37.

[5] Berg's Adv., 3 Con. 77.

[6] Brown's Divorce and Matrimonial Causes, pp. 31 to 54.

"they know they cannot shake off . . . hence austerity of temper, petu-
"lance of manner, rudeness of language, want of civil attentions, even
"occasional sallies of passion if they do not threaten bodily harm, do
"not amount to legal cruelty."

So also in the Divorce Court in London it was held[1] that neglect, coldness, and insults amount to constructive cruelty. But since the decision of this case (in 1893), the House of Lords (1897) in *Russell* vs. *Russell*,[2] by a majority of five to four, held that in order to constitute legal cruelty as between husband and wife the conduct complained of must be such as to have caused danger to life, limb, or health, bodily or mental. It will be noticed from references here given that our Supreme Court has not gone that length, but adopted a more equitable view.[3]

(*e*) Becoming a spendthrift.[4]

(*f*) Running each other continually into needless or extravagant debts.[5]

(*g*) Gambling, by which the estate becomes encumbered or impoverished.[6]

(*h*) Protracted differences between the spouses.[7]

(*i*) Repeated and severe drunkenness.[8]

(*j*) Gross insults by the one spouse to the other.

(*k*) Advertising in the public papers to give no credit to the other.

(*l*) Wilful neglect of duty.[9]

(*m*) Long, continued, and unnecessary absence from home, without good cause.[10]

(*n*) Living apart from each other.

(*o*) Dissatisfaction with their married lot (if the Court is satisfied that it amounts to intolerableness).

(*p*) Continued coolness, or indifference towards each other.[11]

[1] *Walmesley* vs. *Walmesley*, 69 L. T., 152.

[2] 77 L. T., 249.

[3] See also *Jeary* vs. *Jeary*, 3 C. T., 273.

[4] Grotius, 1, 5, 24; Sande, 2, 5, 8; Lybrecht Not. Ambt., 1, 12, 19.

[5] Hol. Con. 3, Con. 342.

[6] Van Alphen, Vol. 2, p. 95.

[7] Grotius, 1, 5, 20, Schorer's Notes thereon, § 18; Van den Berg Adv., 1 Con. 73, and Ibid, 3 Con. 77.

[8] De Akademie, Chap. 11, and *Goldsworthy* vs. *Goldsworthy*, *supra*.

[9] De Akademie, Chap. 11.

[10] Ibid.

[11] See also *Walmesley* vs. *Walmesley*, *supra*.

(*q*) If a wife starts in business in opposition to the wishes of her husband.

(*r*) Neglect on the part of the husband to support the wife.

(*s*) Becoming surety for others against the wish of either.

When the parties have been married *in* community of property, a decree for the division of the property should also be asked for in the summons, and when the parties cannot agree upon a division the Court should make it, or appoint some one to do it. The payment of the debts of the joint estate must first be made before the property is divided. After this decree the one is not liable for debts of the other that may subsequently be contracted.[1]

If the parties have been married by ante-nuptial contract excluding community, each gets back his or her own property; and any settlement made by such contract it is in the power of the Court to cancel.[2] Thus, apart from the question of forfeiture in the case of divorce for adultery,[3] the Court has granted forfeiture also in the case of malicious desertion,[4] and in the case of judicial separation.[5] In *Wessels* vs. *Wessels*[6] the C.J. said :—

"My own opinion is that misconduct which is sufficiently serious to justify a decree of judicial separation would also justify an order cancelling any promise still to be performed by the injured spouse."

During the separation, the wife, if she is the innocent party, is entitled to maintenance from her husband, in keeping with his means and their social position. Where they were married in community of property, the half allotted to her should be sufficient for her maintenance, but if not he must make up the deficiency by periodical contributions. Where she has property of her own, independently of her husband, sufficient to maintain herself as becomes her station in life, and he is too poor, then she cannot claim the support; but if he is able to do so, she can claim it, though she may have

[1] *Ziedeman* vs. *Ziedeman*, 1 M., 238; *Booysen* vs. *Booysen*, Ibid, 242.

[2] Bynkershoek, Quæs. Jur. Priv., 2, 9.

[3] See that Chapter.

[4] See that Chapter.

[5] *Wessels* vs. *Wessels*, 12 S. C., 465.

[6] Ibid.

property of her own sufficient for that purpose. *In any case, the husband can be compelled to support the children.*[1]

It rests with the Court to decide with whom the minor children of the marriage should remain during the separation. Generally, so long as the marriage is not dissolved, the father is entitled to the custody of the children; and when it is dissolved, their custody is with the innocent spouse. But in cases of judicial separation the Court has a wider discretion, and the interests of the children must be looked to, as well as their health and youth, and the grounds which cause the separation. In the case of *Reg.* vs. *Gyngall, re Hausherr*, decided in the Court of Appeal in England in 1893,[2] and which goes fully into the whole question as to the custody of children, Lord Esher said, *inter alia*—

"The dominant matter for the consideration of the Court is the welfare of the child. . . . The welfare of the child, in the largest sense of the word, is to be considered."

In the case of *Barker* vs. *Barker*[3] our Supreme Court decided that the wife, to whom the custody of the children had been given, could not remove them out of the Colony without the husband's consent, nor could the wife sue for their maintenance while they were out of the Colony. Of course this decision does not touch the power of the Court to authorise the children to be removed to another country. The parties may enter into a deed of separation before a notary, instead of obtaining a judicial decree. In such a case, no ground for the separation need be assigned, nor does it matter what it is. A notarial separation is a contract binding only on the parties to it and no one else, and, being thus an extra-judicial separation, it is ineffectual as against creditors or other third parties, and the one remains liable for the debts of the other if the marriage is in community. It is to prevent this liability for each other's debts that a judicial separation is preferable. A notarial separation can be entered into voluntarily only—neither of the parties can be forced into it. But either party may force the guilty one to

[1] Van der Keessel, 90 and 231; Hol. Con. 5, Con. 145; Van der Berg Adv., Vol. 1, Cons. 73, 74, 75 and 100; and Cens. For., 1, 15, 19.

[2] 69 L. T., 481.

[3] 7 C. T., 114, and 14 S. C., 113.

a judicial separation.[1] A notarial separation is no bar to a subsequent judicial separation, and neither a judicial nor a notarial separation is a bar to an action for divorce.[2] No deed of separation, whether notarial or underhand, can be made a rule of Court.[3]

If, then, there is no community of property, and no property to be divided, and no forfeiture of benefits under an ante-nuptial contract or otherwise, and from the position or means of the parties no fear of each other's debts, then there is no necessity for, or benefit to be derived either from entering into a notarial or a judicial separation; for the parties may live apart without the contract in the one case, or the judicial decree in the other; but it is really only for the division of the estate, or for the protection against future debts or earnings of either, that a judicial separation is resorted to.

The public advertisements one so frequently sees in the newspapers, that one spouse will not be responsible for the debts of the other, are not binding in any way, and the spouses do not thereby release each other from the debts for which they are otherwise liable; nor has a notarial deed of separation that effect, even though advertised. The only way to be freed from each other's future debts is by a judicial separation.[4]

Formerly the Supreme Court held that neither party could sue the other on a notarial deed of separation, to carry out its terms, but must institute an action for judicial separation, and in doing so claim the fulfilment of the deed.[5] But in the case of *Rosenthal* vs. *Rosenthal*[6] the same Court upheld the action founded on the notarial deed of separation, and gave judgment on the summons, by default of the defendant, for maintenance and support, without pleadings being filed or a claim being made for judicial separation; and this has been the practice since. Though formerly in all cases for

[1] *Ziedeman* vs. *Ziedeman*, 1 M., 238.

[2] *Richter* vs. *Wagenaar*, 1 M., 262; *Barker* vs. *Barker*, Ibid, 265; *Ziedeman* vs. *Ziedeman*, Ibid, 238.

[3] *Croker* vs. *Croker*, 6 C. T., 20.

[4] See also *Mason* vs. *Bernstein*, 14 S. C., 504.

[5] *Ziedeman* vs. *Ziedeman*, 1 M., 238; and *Van Reenen* vs. *Van Reenen*, decided in 1877, not reported.

[6] Decided in 1886, not reported.

judicial separation evidence had to be led in support of the plaintiff's claim, yet in the case of *Klopper* vs. *Klopper*,[1] where it was clear, from the admitted facts, that it was impossible for the parties to live together, a consent paper being signed by them, and put in, agreeing to the terms of separation, the Court granted the decree for judicial separation and gave judgment by consent. So also was judgment given by the Supreme Court on a similar consent paper for judicial separation.[2] Judicial separations are only provisional in their nature, and are granted in the hope of a reconciliation being effected or a reunion taking place some day between the parties. The marriage tie is not thereby dissolved, only temporarily severed; it therefore does not allow the parties to enter into any fresh marriage, nor does it release them from the obligation of the marriage vow as to fidelity. The marital power is also temporarily suspended, and the community of property, where the parties were married in community, ceases. The wife, upon the separation, has the management of her own property and affairs, and may dispose of them as she pleases. On a reconciliation being effected, the decree of the Court is thereby tacitly cancelled, and all the former marriage relations revive.[3]

If in contemplation of, or pending an action for, judicial separation either spouse meditates or prepares for flight, or makes away with the property, the other may obtain an order to arrest the goods or the party to give security.[4]

As in an action for divorce, so also in judicial separation, the wife can ask for money from her husband to enable her to bring or to defend the action, as well as for maintenance *pendente lite*.[5]

In England, separation is regulated by Act 20 and 21 Vict., Chap. 85, §§ 7 and 16, and Act 21 and 22 Vict., Chap. 108, § 5; and the protection of the wife's property is secured by the Acts of 1870, 1874 and 1882, all of which are in several respects different from our law.

[1] Decided in 1885, not reported.
[2] *Smith* vs. *Smith*, 6 C. T., 381.
[3] Lybrecht, Vol. 1, Ch. 12, §§ 18 to 25; Huber Hed. Regts., 1*b*–6, §§ 13–20; Van Alphen, Vol. 2, p. 25.
[4] *Rabie* vs. *Rabie*, 1 M., 241; *Van Blommestein* vs. *Van Blommestein*, 1 F., 81, and see Chapter "*Arrests*."
[5] See Chapter "*Divorce*."

Summons for judicial separation to enforce a notarial deed of separation entered into between the spouses.

(Heading.)

Command . . . . of . . . ., hereinafter called the defendant, that he appear, &c., to answer . . . . (born . . . .) of . . . ., hereinafter called the plaintiff, and to shew cause why a decree of judicial separation from bed, board and community of property, between the said plaintiff and the said defendant, should not be granted to the said plaintiff by reason of the cruelty of the said defendant towards the said plaintiff; and further to shew cause why the said defendant shall not be ordered to comply with the terms of a certain notarial deed of separation, executed by the said plaintiff and the said defendant at . . . . before the notary . . . . upon the . . . . day of . . . .

As it is said, &c.

Summons by a wife, married out of community of property, for judicial separation, forfeiture of a benefit, custody of children, and maintenance.

(Heading.)

. . . . to shew cause :—

1. Why a decree of judicial separation from bed and board between the said plaintiff and the said defendant shall not be granted to the plaintiff by reason of the cruelty of the defendant in that he did, at various times during the year . . . ., beat her, kick her, threaten to shoot her, spit on her, and lock her up.

2. Why, owing to the drunken habits of the defendant and his cruelty to, and neglect of, the children, the plaintiff shall not be declared entitled to the care and custody of the minor children of the said marriage.

3. Why, during the separation to be decreed the said defendant shall not be compelled properly and suitably to support and maintain the plaintiff and the children, and to pay for the education of the latter; and

4. Why the defendant shall not be declared to have forfeited all benefit to the usufruct, arising out of a certain fund settled by the antenuptial contract between them, which he was to draw during the marriage.

As it is said, &c.

CHAPTER XXIX.

MALICIOUS DESERTION, AND RESTITUTION OF CONJUGAL RIGHTS.

DESERTION is one of the causes for which a divorce may be granted.[1] Though not authoritatively allowed by the Mosaic law, yet it appears to have been in certain cases in the later period of Hebrew History;[2] and though specially prohibited in the beginning of the Christian era, was afterwards to some extent countenanced in the days of St. Paul;[3] and from the latter period it may be said to have been recognised and acted upon in almost all countries as a good ground of divorce.

When the practice actually began in Holland is not certain, but on the 20th June, 1650, divorce for malicious desertion was granted in the case of Cornelis van Oudtshoorn and Catharina Scheek, which seems to have been the first case reported, so far as internal evidence goes.[4] In the latter Consultation (there are two of the same number) is an elaborate opinion of, or essay by, some clergymen on the subject, which is worth perusing as shewing the historical sources from which their information is derived, and upon which their conclusions are founded.

In order, however, to remove any doubt on the subject, the question was set at rest five years thereafter by the publication of the Placaat of the 18th March, 1656,[5] the 91st section of which is as follows, and which is still the foundation of our law:—

"Anyone who frivolously or maliciously leaves his spouse, or who on any intolerable grounds withdraws himself from the marriage bond, or

[1] See Chapter "*Divorce.*"
[2] Compare Mal. II., and vv. 14–16, and the Speaker's Commentary thereon.
[3] 1 Cor. vii. 10–17.
[4] Hol. Con., Vol. 5, Cons. 46, 47 and 48.
[5] G.P.B., Vol. 2, p. 2445.

goes away and leaves his spouse, with the intention of not returning to her again, leaves the innocent party free to re-marry. And when the innocent party has for long but to no purpose employed every means to get the guilty party back, he may complain to the Judge of the place where he resides, who, after due enquiry and being satisfied of the desertion, and after duly summoning the deserter, may grant leave to the innocent party to re-marry, and shall, moreover, condemn the deserting party to banishment from the country."

No sooner, however, was this Placaat enacted than further doubts arose, not so much as to what it contained as to what was left unsaid, or what might be implied. For instance, the first question that arose was whether an existing marriage could be cancelled, because the Placaat only says that the "innocent party shall be allowed to re-marry." However, the Court decided that it could.[1] Thus, also, not a word is said in the Placaat as to whether the offending party might marry again, but all commentators are agreed that he might.[2] The Placaat says that the deserting party shall be "banished" from the country. "Banishment" was frequently resorted to in Holland. It was specially introduced there by the Placaaten of the 16th December, 1595, 16th and 17th September, 1614, 19th July, 1607, 12th May and 25th June, 1649, 1st March, 1663, 15th April, 1761, 26th April, 1765, and 6th May, 1785. The law of "banishment" is in force with us also though it is not practised by the Civil Courts at the present day. It is frequently enforced, however, under Martial Law. In Griqualand West a few years ago certain illicit diamond buyers could be banished from that territory, but that Proclamation on the annexation of that territory to the Cape Colony was repealed.

Though the Placaat says a "malicious desertion," it refers also to "the intention not to return." Many differences of opinion therefore arose as to whether the desertion must necessarily be malicious *ab initio;* or whether it might be inferred from the fact that the defendant had no intention of returning. Some writers held the former, while others maintained the latter, view, which was the one ultimately adopted.

[1] Hol. Con., Vol. 5, Con. 46; Brouwer, 2, 18, 2; Van Zurck, Codex Batavus, Tit. "Desertie," § 30.

[2] See the Annotations by Boel on Loenius, Con. 16.

It was owing to this difference of opinion that two actions were required: the first was for restitution of conjugal rights; and failing a compliance therewith by the defendant within the time fixed by the Court, then the second action was begun for divorce, by reason of the non-compliance with the order in the first action. In both cases the proceedings had to be preceded by a petition for leave to sue, in case the defendant was out of the jurisdiction; in both cases also, whether the defendant was in or out of the jurisdiction, the summonses and pleadings and evidence were necessary. In both cases there had to be the same mode of service, advertisements and proofs, excepting that in the first case the marriage had to be proved, which was not necessary in the second case; but the decree in the first case had to be put in,[1] while in the second case the additional evidence required was that the defendant had failed to return, though every effort had been made towards that object.[2]

But though the law of malicious desertion has not been altered, the process has been considerably cheapened and simplified by the abolition of these two actions by the 371st Rule of Court, which enacts that

"in any action for restitution of conjugal rights the plaintiff may also claim a decree for divorce. Upon the hearing of the cause the Court may order the restitution of conjugal rights, and may further direct the defendant to shew cause on a day to be named in such order, not being less than seven days after the day fixed for compliance with the order of restitution, why a decree of divorce shall not be granted. If upon such return day it shall be proved by affidavit or otherwise that the defendant has failed to comply with the order for restitution of conjugal rights, the Court may grant a decree of divorce, or make such order as to it may seem meet."

Since this rule the practice has been for the Court, if satisfied with the evidence as to desertion, to grant an order for the defendant's return to the plaintiff by a certain day specified in the order. It orders also the service or publication of the decree, in the same manner as the summons or edict was served or published, unless for good reasons a different mode of service or publication of the decree has

[1] *Van Blerck* vs. *Van Blerck*, 1 M., 257.

[2] See Chapter "*Edictal Citation.*"

become necessary; with an intimation that, if the defendant does not return to live and cohabit with the plaintiff by the day named, then on proof being shewn by the plaintiff by affidavit or otherwise that the defendant did not return to him by the day named, the divorce shall thereupon be granted on a subsequent day also named in the order.

In this order to return by a day named, the Court can also by the common law add any other order it thinks right in such cases; for instance, as to forfeiture of the community or benefits of the marriage, or as to the custody of the children, or as to costs of the action, etc.

The action for restitution of conjugal rights must be to cite the defendant to return to, and live and cohabit with, his or her spouse.[1] This must be by regular action and cannot be by motion.[2] The accused party must in defence show a good reason why he or she will not return. But the Court will not entertain the action at the suit of a non-resident wife against a non-resident husband in respect of a marriage which was not contracted in this Colony.[3]

The deserting party, though the desertion be for a good reason, cannot bring an action for desertion.[4] A decree for malicious desertion cannot be obtained by either party while a deed of voluntary separation is still in existence;[5] nor while a decree of judicial separation is still in force.[6] The private deed must first be cancelled by the parties; or the judicial decree must be first cancelled by the Court; or the parties must have lived and cohabited together again, which is a tacit cancellation of both; after which, for any fresh offence by either, the other has his or her usual remedy. But where the conditions of the private deed had been broken by both parties, who regarded it as a nullity, the decree for malicious desertion was granted.[7]

After repeated malicious desertions by the wife, the husband need not take her back or give her alimony.[8] A

[1] Van Alphen, Vol. 2, p. 4; and Hol. Con., Vol. 4, Con. 151.

[2] *Van Blerck* vs. *Van Blerck*, 1 M., 255.

[3] *Whipp* vs. *Whipp*, 5 C. T., 225; *Rosenwax* vs. *Rosenwax*, 11 C. T., 10.

[4] *Truter* vs. *Truter*, decided 1875, not reported.

[5] *Botha* vs. *Botha*, 1 M., 259.

[6] *Alcock* vs. *Alcock*, 1 M., 257.

[7] *Gibson* vs. *Gibson*, 2 E.D.C., 280.

[8] Hol. Con., Vol. 4, Con. 229.

wife is not entitled to the profits of the joint estate arising after she has left her husband, if she leave him without a just cause.[1] By our law the duration of absence between the desertion and the institution of legal proceedings is not a necessary ingredient in an action for restitution of conjugal rights where the desertion is clearly malicious. In the case of *Mostert* vs. *Mostert*[2] the decree was granted where the wife had been absent only six days before the issue of the summons. No time is thus fixed in law; all that is required is that the Court must be satisfied that, where the time is short, there is clear evidence of immediate and determined desertion, and evidence also that the defendant said or wrote, or otherwise implied, that he or she would not return to live and cohabit with the other.[3]

In Scotland the innocent party must wait four years before he or she can institute an action for desertion.[4] But in England the mere desertion on the part of either spouse is no ground for divorce, however long continued, though it is a ground for judicial separation; but in the case of a husband, if his desertion be for two years without reasonable cause and accompanied by adultery, it is a ground for divorce.[5]

There is, however, in no case to be collusion between the parties, the one to pretend to desert or be absent, so as to enable the other to sue for desertion; if collusion be proved, or can be reasonably inferred from the conduct of the parties, then the decree cannot be granted.

The decree for restitution of conjugal rights is the only one of its order which the Court cannot enforce by a personal attachment for contempt. A few years ago the attempt was made in England, but the Act was repealed the next Session. Of course, any part of the order, other than the part calling upon the defendant to return by a certain day, can be so enforced.[6]

What, in general, constitutes malicious desertion has been

[1] Sande, 2, 5, 7.
[2] 2 S., 128.
[3] Loenius, 16; Cos over de Boedelmenging, p. 246, §§ 14 and 15; Brouwer, 2, 18, 2; Lybrecht, 1, 12, 13.
[4] The Scotch Statute of 1573, c. 55.
[5] Browne on Divorce and Matrimonial Causes, pp. 45–54.
[6] See Chapter "*Contempt of Court.*"

decided with us in the following reported cases:—(*a*) There must be proof that the one deserted against the will of, and refused to return to, and cohabit with, the other.[1] (*b*) There must be no lawful or just cause for the desertion.[2] Ill-treatment or continued drunkenness would be a just cause for desertion.[3] (*c*) The evidence of desertion must be clear; thus where it was doubtful whether the wife left with or without the consent of her husband, he did not get his decree.[4] But this doctrine has of late years been considerably modified, and the question is now largely confined to the non-return. (*d*) Refusing without just cause to accompany her husband to his domicile or place of abode.[5] (*e*) Though it is admitted by a plaintiff that the object of asking for a restitution of conjugal rights is really with a view to obtaining the divorce, it is no ground for refusing the decree of restitution.[6] But if the plaintiff admits that even if the defendant were willing to return to him he would not take her back, he is not entitled to his decree.[7]

Besides these, there are various other grounds, by our law, that constitute malicious desertion; for instance (*a*) by becoming a monk or nun, if there is proof of no intention of returning.[8] (*b*) When either spouse obstinately refuses the other the privileges of the marriage, and remains therein obstinate and determined, it is also a direct cause for divorce.[9] (*c*) Where the spouses were both Roman Catholics, but after marriage the husband embraced the Reformed religion, and, being afraid of an Inquisition, fled, begging his wife to accompany him, and promising never to speak to her upon controversial points of religion; as she refused to accompany him, the Court dissolved the marriage by reason of desertion.[10]

[1] *Campbell* vs. *Campbell*, 1 M., 252; and *Reeves* vs. *Reeves*, Ibid, 244; Hol. Con., Vol. 4, Con. 151.

[2] *Mackay* vs. *Mackay*, 1 M., 256, and *Mulder* vs. *Mulder*, Ibid, 244; *Le Roex* vs. *Le Roex*, 2 S., 13.

[3] *Goldsworthy* vs. *Goldsworthy*, 10 J., 139; *Lawrence* vs. *Lawrence*, 5 C. T., 133.

[4] *Gough* vs. *Gough*, 1 M., 257.

[5] *Le Roex* vs. *Le Roex*, 1 M., 255; and *re Miller*, 3 S., 227.

[6] *Heathershaw* vs. *Heathershaw*, 1 R., 186; *Gibbon* vs. *Gibbon*, 2 E.D.C., 280.

[7] *Corbeau* vs. *Corbeau*, 2 C. T., 208.

[8] Lybrecht, Vol. 1, Chap. 12, § 13.

[9] Cos. over de Boedelmenging, p. 248, § 17.

[10] Hol. Con., Vol. 5, Cons. 46 and following.

But apart from the grounds here given as constituting malicious desertion, it may also be implied from the general conduct of the defendant. Thus in the case of *Kohler* vs. *Kohler*,[1] it was proved at the trial that the defendant left the Colony, with the knowledge and consent of his wife, to benefit himself. For a couple of years he regularly corresponded with her from England and America, but afterwards ceased; her letters were no longer answered, and she could find no trace of him. She then sued him for malicious desertion, and the Court ordered the edict to be served at the place where his last letter to her was dated from, in America. He could not be found, and did not appear; whereupon the order for restitution was decreed, which was also served at the same place as the edict. On his failing to comply with the order the divorce was granted. Strange to add that, within two hours after she had obtained the final decree for divorce, he turned up on his way from England to Australia, and landed only, as he said, out of curiosity "to see whether she were married again." But she refused to see him, and he left that same night for Australia.

On a comparison of the references as to cases decided in this Chapter, with the opinions of the various writers on this subject, it will be seen how each writer and each decision has added something new to the former, and how new points have been adopted and hardened into law, as it now is, by custom; and how gradually the said Placaat received a more and more liberal interpretation by the decisions and practice of the Courts, as the knowledge of human nature became more extended.

Simple absence does not constitute desertion, though the period be a long one; the defendant may be able to give a satisfactory explanation of the cause of his absence and why he cannot at the time return. Of course, the Court must be satisfied as to his inability to return then or within a reasonable time; he might be absent either on his own business, or in the service of the State as a soldier or sailor. Again, a person might have left home for a lawful cause, and if he had not been heard of for five years, the innocent spouse

[1] Decided in 1877, not reported.

might marry again with leave of the Court.[1] From the earliest times all writers are agreed that this section of the Placaat does not cancel the marriage; and that the party re-marrying does so at the risk of the absent spouse turning up, and must live again with that spouse, if he or she should claim it; failing which, he or she can institute an action for divorce by reason of adultery; but the children of the marriage, which had been contracted in good faith, would be legitimate.[2] By the law of England unknown absence for seven years entitles the innocent party to re-marry, which re-marriage, however, is no ground for a charge of adultery.[3]

I know of no case in this Colony where leave to re-marry was granted owing to unknown long absence. On the contrary, in one such case it was refused;[4] and in practice I have always preferred to sue for malicious desertion, for if this decree is obtained, it is of some advantage to the innocent spouse, as it cancels the marriage, whereas the other does not. Moreover, the innocent spouse, especially a woman, does not like to run the risk of being sued for adultery on the return of the former spouse; but owing to the custom and the liberal interpretation of the law I have referred to, it is no longer absolutely necessary to prove that the desertion was *ab initio* malicious. The refusal or failure to return can also be construed into a malicious intention of departure.

The action for restitution of conjugal rights is after all only a fictitious preliminary to the action for divorce; no one would sue a malicious deserter to return if the object was not divorce. The divorce may not necessarily be asked with a view to re-marriage; it is often solely to be freed from the debts likely to be contracted by the other, or to get the guilty party's interest or benefit in the joint estate forfeited, so as to have a free disposal of the whole where the marriage has been in community of property. If the only motive were the return of the deserter, there are other social means and influences to be used for that purpose instead of invoking the

[1] § 90 of the said Placaat.

[2] Van Zurck, Codex Batavus, Tit. "Huwelyk," § 29; Van Alphen, Vol. 2, p. 589; Van der Keessel, 64.

[3] Stephen's Com. Law of England, Vol. 4, Bk. 4, Chap. 11, § 3; see also Chapter "*Long Absence.*"

[4] *Re Booysen*, 1 F., 187, and see Chapter "*Divorce.*"

aid of the law. It is for these reasons that I cannot understand why the old jurists should have been so pertinacious as to proof of malicious desertion *per se*. The tendency of modern decisions is rightly to look not to one isolated act, or the act of desertion by itself, but to take "all the circumstances" into consideration, and to deduce therefrom, if it can reasonably be done, the act of desertion. Of course, if there is clear evidence of the refusal of the party to return, it is an act of desertion, and the decree must be granted; so also must the decree be granted if the party has knowledge of the proceedings against him and enters no appearance or does not obey the order of Court to return; but suppose there is no clear proof that he has knowledge of the proceedings, then the Court *must be satisfied from the evidence produced, and from all the surrounding circumstances of each particular case, that the party's conduct amounts to a desertion.* It is a matter very much in the discretion of the Court, and in judging of such conduct every ingredient should be taken into consideration; such as the pecuniary means and social position of the parties, their habits and customs, the primary cause of the defendant's absence, under what circumstances he or she left, to or for what place, to a great distance or close by, to a foreign country or not, to a civilised country or a barbarous or sparsely populated one, the means of communication, the cause of the continued absence, the correspondence or not between the parties, the contribution by the one towards the other's support; also the efforts made by either to induce the other to return, or by a husband to induce his wife to follow him, or the means adopted or steps taken by the innocent party to discover the whereabouts of the other, the unexplained absence, and the defendant's silence. All these, I say, must be taken into consideration, and if *they point to the possibility of the defendant's non-intention or non-likelihood to return to his or her spouse, and live and cohabit together, the decree for divorce must be granted.* But even if there is clear proof that the desertion was *ab initio* malicious, the party may repent it, and on his or her offering to return, whether voluntarily or after a summons, the other party must take him or her back. The bare offer to return

to the home is, however, not sufficient. There must be an actual return and a complete resumption of all previous conjugal rights and privileges; otherwise it would be in the power of the offending party to offer to return, so as partly and ostensibly to comply with the order of Court, but in reality in order to prevent the other from getting his or her divorce, or again, having returned, to abstain from or refuse all other marital privileges, and so defeat the very end of marriage.

As in the case of adultery, so also in case of malicious desertion, and of judicial separation, the guilty party forfeits in favour of the innocent all benefits derived by virtue of the marriage.[1]

Summons for divorce by reason of malicious desertion.

(Heading.)

Command A.B. of . . . . hereinafter called the defendant, that within . . . . days after the service of this summons, he cause an appearance to be entered in our Supreme Court of our said Colony, at Cape Town, to answer C.D. of . . . ., her husband, hereinafter called the plaintiff, in an action wherein the plaintiff claims :—

1. That, by reason of the defendant's unlawful and malicious desertion since the . . . . day of . . . . from her home at . . . ., she be ordered and condemned forthwith to return to, live, and cohabit with him as her lawful husband; and on her failing to do so by the time to be fixed by this Honourable Court, then for a decree of divorce by reason of such malicious desertion.

(*If there are minor children of the marriage, then add next count.*)

2. That the plaintiff may be declared entitled to the custody of the minor children of the said marriage.

(*If the parties were married in community of property, then add the next count.*)

3. That, by reason of her desertion, as aforesaid, the defendant be declared to have forfeited her half share in the community of property existing between them, by virtue of their marriage in community.

(*Or; if married out of community of property, and there is a settlement made by ante-nuptial contract, then, instead of the preceding clause, put the following:*—)

3. That, by reason of the desertion aforesaid, the said defendant shew cause why (*here state nature of the benefit, as for instance*) the settlement of the life policy by the plaintiff on the defendant before their marriage by the ante-nuptial contract between them dated the . . . . day of . . . .

[1] *Dawson* vs. *Dawson*, in 1892; 9 J., 446; 2 C. T., 333; *Wessels* vs. *Wessels*, 12 S. C., 465.

shall not be set aside, and the defendant declared to have forfeited all right thereto, and the plaintiff be declared to be reinvested with all his former rights therein.

As it is said : etc.

Witness, etc.

(NOTE.—*If the proceedings have to be by "edictal citation," then proceed as follows :—*)

Petition to sue by edictal citation for divorce for malicious desertion, etc.

(Heading.)

The petition of C.D. of . . . .

Humbly sheweth :—

1. That your petitioner was married to A.B. at . . . . on the . . . . day of . . . . in community of property.

2. That thereafter they lived at . . . . ; and for the . . . . years they have lived in this town.

3. That there are . . . . children of the said marriage aged respectively . . . . years . . . . years and . . . . years.

4. That without any lawful cause or excuse, the said A.B. maliciously deserted her home on or about the . . . . day of . . . . last past ; and is presumed to be at present at . . . ., beyond the jurisdiction of this Honourable Court.

5. That your petitioner is desirous of suing his said wife by edictal citation for restitution of conjugal rights ; and, failing her return, for divorce, by reason of her malicious desertion as aforesaid ; also for the custody of the minor children of the said marriage ; and for a forfeiture of her share in the community of property by reason of her said desertion.

Wherefore your petitioner humbly prays that your Lordships will be pleased to grant an order allowing him to sue his said wife by edictal citation for restitution of conjugal rights, by reason of her said malicious desertion ; and, on her failing to comply with your Lordships' order to be given herein, then for a divorce by reason of such desertion and failure to return ; also for the custody of the minor children of the marriage ; and for a forfeiture of her half share in the community of property ; and further that your Lordships will be pleased to give directions as to the mode of serving the citation and all the other necessary processes ; and fix the time for the appearance of the defendant to such citation.

And your petitioner, as in duty bound, will ever pray.

(*Affidavit of Verification.*)

(NOTE.—*If the parties were married out of community of property, and there was a settlement on the wife, then, in lieu of Clauses* 1 *and* 5 *of the preceding petition, put these clauses :—*)

1. That your petitioner was married to A.B. at . . . . on the . . . . day of . . . . out of community of property ; and that by the ante-nuptial contract executed between them, and passed before the notary public . . . . on the . . . . day of . . . ., he settled upon her a certain life policy, effected

on his life in the office of the S . . . . A . . . . M . . . . Life Assurance Society, for the sum of £1,000 sterling.

5. That your petitioner is desirous of suing his said wife by edictal citation for restitution of conjugal rights; and, failing her return, for divorce, by reason of her malicious desertion as aforesaid; also for the custody of the minor children; and for a forfeiture of the benefits under the said ante-nuptial contract.

Wherefore your petitioner humbly prays that your Lordships may be pleased to allow him to sue the said A.B. by edictal citation for restitution of conjugal rights by reason of her said malicious desertion; and, on her failure to comply with your Lordships' order to be given herein, then for divorce by reason of such desertion and failure to return; also for the custody of the minor children of the said marriage; and further, that the said A.B. may be declared to have forfeited all benefits under the said ante-nuptial contract; and that your petitioner may be declared to be reinvested with all his former rights in, and to, the said life policy; and further also that your Lordships may be pleased to give directions as to the mode of serving the citation and all other necessary processes, and fix the time for the appearance of the defendant to such citation.

The following are the usual order, edict, intendit and notice.

In the Supreme Court, &c.

Cape Town, Wednesday . . . .

Between G . . . . G . . . . applicant,
and W . . . . G . . . . respondent.

Upon the motion of Mr. . . . ., of counsel for applicant, and upon reading the petition and affidavit of the applicant,

It is ordered

That she be at liberty to sue respondent, her husband, for restitution of conjugal rights, failing which, for dissolution of their said marriage, by edictal citation . . . ., returnable on the . . . . day of . . . ., and to serve the *intendit* at the same time: personal service to be made, if possible, failing which, one publication in the . . . . newspaper, in addition to the usual publication in the *Government Gazette.*

By order of the Court.

(Signed) . . . . . .
Registrar.

Citation by edict.

(See note to forms in Chapter "Edictal Citations.")

(Heading.)

That whereas G . . . . G . . . . (born . . . .) of . . . . Cape Colony, did on the . . . . day of . . . . petition this Honourable Court for leave to sue by edict her husband W . . . . G . . . ., lately of the Cape Colony, but last heard of at Bloemfontein, Orange Free State, for restitution of

conjugal rights; and, on failure thereof, for a decree of divorce by reason of his malicious desertion and for custody of the minor children:

Now this Court having taken the prayer of the said G.G. into consideration, and granted the same accordingly, by these presents doth summon the said W.G., lately of Cape Town, to appear before the said Supreme Court on the . . . . day of . . . . at 10 o'clock in the forenoon, either in person or by proxy, to shew cause (if any) why he shall not be ordered to return to, and live and cohabit with, the applicant as his wife; or otherwise, why a decree of divorce shall not be granted by reason of his wilful and malicious desertion of her; and why she shall not have the custody of the children of the said marriage.

(NOTE.—*If there is to be a forfeiture of the community of property or of a benefit under an ante-nuptial contract, then insert here a clause similar to one in preceding summons.*)

Thus done and granted in the Supreme Court of the Colony of the Cape of Good Hope at Cape Town on the . . . . day of . . . .

(Signed) . . . . . .
Registrar of the Supreme Court.

(Signed) . . . . . .
Attorneys for the plaintiff and petitioner,
. . . . Cape Town.

In the Supreme Court, &c.

Between G . . . . G . . . . (born . . . .), plaintiff,
and W . . . . G . . . ., defendant.

PLAINTIFF'S INTENDIT.

W . . . . G . . . ., the defendant, has been summoned by the edictal citation of this Honourable Court, to answer G . . . . G . . . ., the plaintiff, in an action for the restitution of conjugal rights; or, if need be, for divorce, by reason of the defendant's malicious desertion: wherefore the plaintiff says:—

1. She and the defendant were married at the cathedral in . . . ., England, on the . . . . day of . . . ., and the said marriage is of full legal force and effect.

(NOTE.—*If the marriage was in community of property, then alter the clause as follows:*—)

. . . . were married in Cape Town in community of property on the, &c. &c.

(*If married out of community, then say:*—)

. . . . were married in . . . ., Cape Town, without community of property, on the &c. as appears by the ante-nuptial contract between them bearing date the . . . . day of . . . ., and hereto annexed, and by which the life policy therein mentioned was settled on the defendant.

2. That there are two children alive of the marriage, both girls, aged respectively 10 and 6 years.

3. In or about the month of . . . . the defendant maliciously deserted the plaintiff, and has not returned to her; and has refused, and still refuses, to contribute anything towards the support of the plaintiff and her said children.

The plaintiff claims :—

(*a*) A decree of restitution of conjugal rights ordering the defendant to return and cohabit with, and support, the said plaintiff:

(*b*) In default of compliance with the said decree, the plaintiff claims a decree of divorce, dissolving the said marriage between herself and the defendant :

(*c*) The custody of the said children :

(NOTE.—*If there is to be a forfeiture of the community of property, or of a benefit under an ante-nuptial contract, then add*—

"That the defendant may be declared to have forfeited all benefits under the marriage in community of property (*or*) That the defendant may be declared to have forfeited all benefits under the said ante-nuptial contract.")

(*d*) Such alternative relief as to this Honourable Court may seem meet, with costs.

. . . . . .
Plaintiff's Counsel.

. . . . . .
Plaintiff's Attorneys,
. . . . Cape Town.

To W . . . . G . . . ., the above-named defendant.

Take notice that you are required to plead, answer, except, or make claim in reconvention, to the above declaration by the . . . . day of . . . . next; failing which this cause will be set down for trial for default of appearance and plea for Thursday the . . . . day of . . . .

Dated at Cape Town this . . . . day of . . . .

. . . . . .
Plaintiff's Attorneys.

(NOTE.—*On the case being called, an affidavit should be filed stating what efforts have been made to serve the defendant personally, for instance*:—)

(Heading.)

I, A.B., of . . . ., make oath and say :

1. That I was employed by the plaintiff's attorneys to serve the edict in this case on the defendant—personally, if possible.

2. That I have made enquiries of different people, who were likely to be able to give some information as to the defendant's whereabouts ; but failed to gain any ; and that I have also otherwise made all reasonable and proper efforts to serve the defendant personally, but failed to find him.

(*Or*:—*give any satisfactory reasons why edict could not be served personally.*)

Sworn at . . . ., etc.

(NOTE.—*On the return day mentioned in the preceding notice, the plaintiff must give evidence as to the marriage and the desertion; whereupon the following form of order is usually granted, and published as directed in the same manner as the edict and interdict were.*)

Records in civil cases
in the Supreme Court
of the Colony of the
Cape of Good Hope.

Between G . . . . G . . . ., (born . . . .), plaintiff.
And W . . . . G . . . ., defendant.

Be it remembered that W . . . . G . . . ., the defendant in the above-named suit, was summoned to answer his wife G . . . . G . . . . (born . . . .), the plaintiff in the said suit, by edictal citation, in an action for restitution of conjugal rights; failing which, for a decree dissolving the said marriage, and declaring the plaintiff entitled to the custody of the children of the marriage.

And be it further remembered that on Thursday the . . . . day of . . . . before the said Supreme Court, came the said plaintiff, her counsel, attorneys and witnesses; and the said defendant made default, and thereupon having heard counsel for plaintiff, and the evidence adduced,

The Court grants judgment to plaintiff for a decree of restitution of conjugal rights with costs: defendant to return to, or to receive, plaintiff on or before the . . . . of . . . . next; failing which, to shew cause, if any, on the last day of next term (. . . . day of . . . .), why a decree shall not be granted, with costs, dissolving the said marriage, and declaring plaintiff entitled to the custody of her children by the defendant: rule to be served personally, if possible, failing which, one publication in the . . . . newspaper.

By the Court

. . . . . .
Registrar.

To W . . . . G . . . .,
The above defendant.

Sir,—Take notice that if you fail to comply with the above order of Court, final judgment will be prayed against you on the . . . . day of . . . .

. . . . . .
Plaintiff's Attorneys.

Cape Town . . . . . (date).

(NOTE.—*If, by the day fixed by the Court in the foregoing order for the defendant to return, he or she did not do so, then proof should be adduced by the plaintiff "by affidavit or otherwise"* (*Rule* 371) *that the defendant has not returned. The Court has generally been satisfied with an affidavit to that effect.*)

Affidavit of non-return.

(Heading.)

I, G . . . . G . . . ., of . . . . the above plaintiff, make oath and say that the defendant has not returned to me, neither by the day fixed by this Honourable Court in the order hereunto annexed, nor since.

Sworn at, ... etc.

Citation and intendit where there is no property and are no children.

Citation by edict.

(See note to forms in Edictal Citations.)

(Heading.)

That whereas A. S. (born . . . .), of Cape Town, did on the . . . . day of . . . ., petition this Honourable Court for leave to sue by edict her husband, J. C. S., a fitter, lately of Cape Town, but whose present whereabouts is unknown, for restitution of conjugal rights; and, on failure to comply with that, then for a dissolution of the bonds of marriage by reason of his malicious desertion:

Now this Court, having taken the prayer of the said A. S. into consideration, and granted the same accordingly, by these presents doth summon the said J. C. S., now or lately of Cape Town, to appear before the said Supreme Court on the . . . . day of . . . . at 10 o'clock in the forenoon, either in person or by proxy, to shew cause (if any) why, by reason of his unlawful and malicious desertion as aforesaid, he shall not be ordered to return to, and live and cohabit, with his said wife; and, on failure so to do, why the bonds of marriage subsisting between them shall not be dissolved.

Thus done and granted in the Supreme Court of the said Colony at Cape Town on the . . . . day of . . . .

(Signed) . . . . . .
Registrar of the Supreme Court.

. . . . . .
Plaintiff's Attorneys,
. . . . Cape Town.

In the Supreme Court, etc.

Between A . . . . S . . . ., plaintiff, and J . . . . C . . . . S . . . ., defendant.

Plaintiff's Intendit.

1. J. C. S., the above defendant, has been summoned, by edictal citation of this Honourable Court, to appear on the . . . . day of . . . . to answer his wife, A. S., the above plaintiff, in an action for the restitution of conjugal rights, and, in default thereof, a decree for divorce on the ground of unlawful and malicious desertion.

2. The plaintiff and the defendant were married on the . . . . day of . . . ., at Cape Town, which marriage still subsists.

3. In the year . . . . the defendant unlawfully and maliciously deserted the said plaintiff and still is absent from her.

Wherefore the plaintiff prays

(*a*) That her said husband may be ordered to return to, live and cohabit, with her, and, in default thereof, a decree dissolving the said marriage.

(*b*) Such alternative relief as to this Honourable Court may seem meet.

. . . . . .
Plaintiff's Counsel.

. . . . . .
Plaintiff's Attorneys,
. . . . Cape Town.

To J.C.S.,
the above-named defendant.

Take notice that you are required to plead, answer, except, or make claim in reconvention, to the above declaration by the . . . . day of . . . . next: failing which this case will be set down for trial for default of appearance and pleas for . . . . the . . . . day of . . . .

. . . . . .
Plaintiff's Attorneys,
. . . ., Cape Town.

CHAPTER XXX.

DIVORCE.

THOUGH marriage, in its original institution, was regarded as indissoluble,[1] yet, in course of time, divorce became customary, as there was no special prohibition against it in the Mosaic law; and we have it on the testimony of Christ that Moses allowed them (the Israelites) a divorce because of the hardness of their hearts, "but from the beginning it was not so."[2]

All the causes for which divorce was granted under the Mosaic law are not assigned. We read, however, in Deuteronomy[3] that a husband finding *some uncleanness* in his wife can "write her a bill of divorcement, and give it in her hand, and send her out of his house." Also that a husband could divorce his wife if he *hated* her.[4]

But we have it from ancient history that divorces were sometimes granted for the merest caprice, and that the most trifling reasons were sufficient. It would seem that at first the husbands only could get a divorce, but that the wives could not. This privilege was afterwards extended to the wives also, and the first instance recorded of a wife obtaining a divorce was that of Salome, the sister of Herod.[5]

There were, however, some causes in the Mosaic period for which a husband could *not* obtain a divorce.

(*a*) If he had falsely accused his wife of not being a virgin.[6]

[1] Gen. ii., 24; and Matt. xix., 5.
[2] Matt. xix., 8; Mark x., 1–12; 1 Cor. vii.
[3] xxiv., 1.
[4] Ibid, 3.
[5] Josephus' Antiquities, Vol. xv., 7, § 10.
[6] Deut. xxii., 13–21.

(*b*) If he had seduced a virgin, not betrothed, whom he was in consequence bound to marry.[1]

In Athens and Sparta a husband might sue his wife for divorce if she bore him no issue; or he might divorce her without giving any reason, and *without ceremony*, by simply, in the presence of witnesses, sending her out of the house; or the spouses might call upon each other mutually to agree to a divorce.

Under the Roman law, as under the Mosaic law, the privilege of divorce was at first allowed to the husband only, and sometimes on the most frivolous pretext. Thus Spurius Carvilius Ruga, B.C. 234, divorced his wife on the ground of barrenness.

Cneius Pompëius divorced his wife, Mucia, for *alleged* adultery. Cicero divorced his wife, Terentia, by letter, without assigning any cause, after having lived with her for thirty years. Cato, the younger, divorced his wife, Marcia, that his friend Hortensius might marry her to have children by her.

The first instance of a wife under the Roman law seeking divorce from her husband is mentioned by Cicero, viz.: that of Paula Valeria, who served her husband with notice of divorce on his return from his Province, but assigned no cause for it.

The Emperor Justinian restricted the power of divorce in certain cases, and allowed no divorce by consent, unless the parties were thenceforth to live in a monastery.

We see thus how from time to time facilities for divorce were allowed in ancient days, when husbands regarded their wives as no better than pieces of furniture, to be dealt with as they pleased, or to be disposed of at their leisure. Gradually, however, the claims of the wives came to be recognised, but while *they* had to assign a cause for a divorce, the husbands still retained the sole right of claiming a divorce without assigning any cause whatever, and when they did, it was often for causes of the shallowest kind, and on the most frivolous grounds; thus a husband could divorce his wife if she did not cook his dinner to his liking, and Josephus

[1] Deut. xxii., 28 and 29.

himself divorced his wife, the mother of his three children, for "not liking her ways."[1] If Mrs. Caudle had lived in those days she would not have remained married a week, for her husband would most assuredly have divorced her at once for her habit of grumbling and constantly nagging! But then we should not have had her "Curtain Lectures"!

But all these facilities and trivial causes of divorce were done away with by Christ, who altered the law and restricted the grounds of divorce to the single instance of adultery;[2] and St. Paul afterwards added "Desertion."[3]

These two causes of divorce, "Adultery" and "Malicious Desertion," have been almost universally adopted as the usual grounds of divorce, and have so been by statute declared in Holland,[4] though by the Canon and the Dutch law, by custom and practice, a few others have been added, viz.:—

"Commission of an unnatural crime," such as sodomy or bestiality.

"Perpetual Imprisonment;"

"Long Absence;" and

"Refusal of the Marital Privileges;" all of which are in force with us also.

There are also grounds for which a divorce may be granted, not for a post-nuptial offence, but for a cause antecedent to the marriage, and in which the action is not to set aside a legal marriage, but to *repudiate* a marriage, and to have it declared that there never was a legal marriage, and that thus the alleged marriage was void *ab initio*, viz.:— (1) Impotency, as in eunuchs, or castrated persons, or from whatever other cause; (2) Ignorance of previous *stuprum;* and (3) Insanity. These also are in force with us.

Of course, Death, the natural period of dissolution, dissolves a marriage, and it is for this reason that "perpetual imprisonment" being regarded as a kind of "civil death," is a cause for a dissolution of the marriage. In another Chapter I have treated of "*Malicious Desertion.*" I shall

[1] See last chapter of his life.

[2] Matt. v. 32, and xix. 9.

[3] 1 Cor. vii.; see also Grotius, 1, 5, 18; and Chapter "*Malicious Desertion.*"

[4] See the Placaaten quoted in this Chapter, and in the Chapter on "*Malicious Desertion.*"

now take the grounds for divorce and repudiation in the order here mentioned; and first as to

1. ADULTERY.

Before there can be a divorce there must have been a legal marriage,[1] and therefore the marriage must first be proved, if not admitted, before the cause of divorce can be enquired into.

This proof is usually by handing in the duplicate original of the plaintiff's marriage certificate,[2] or by the production of the original marriage register in the hands of the minister, or marriage officer, who has the custody thereof; or of the duplicate original register in the custody of the Colonial Secretary; and by filing with the record a certified copy thereof by the party in whose custody the register is.[3] Though this Order in Council says that every such copy "shall respectively be good evidence of the facts therein recorded . . . . in and before all Courts and proceedings whatever in which it shall be necessary to give evidence of the marriage. . . . .," yet the Supreme Court has invariably required also the production of the original register, either in the custody of the local minister or marriage officer; or the duplicate original in the custody of the Colonial Secretary; and also that the plaintiff shall swear to his or her signature or mark thereto. Of course I can understand that where there is an action for damages for adultery pending, the clearest evidence of marriage is desirable, to prevent fraud and collusion between the plaintiff and his alleged wife, but why in an action for divorce only the additional precaution of evidence, other than the production of the certificate, is required, I do not see, as no one is likely to seek a divorce if he has not been married. The only reason assigned for this additional evidence is the supposed one of identifying the parties before the Court with the persons named in the register or certificate.[4]

[1] See Chapter "*Marriage.*"

[2] *Brown* vs. *Brown*, 8 C. T., 395.

[3] Order in Council of 7th September, 1838, § 21.

[4] *Rykie* vs. *Rykie*, B. for 1868, p. 114; *Hodges* vs. *Hodges*, Ibid, for 1870, p. 297; and *Motomela* vs. *Motomela*, 2 E.D.C., 12.

By the law of England the mere production of the marriage certificate, or a certified copy thereof, is sufficient evidence of marriage, and acted on by the Courts without any other evidence.

So also in this Colony it has been the practice of the Supreme Court, since 1880, to accept the marriage certificate, or a certified copy thereof, as sufficient evidence of a marriage contracted in the United Kingdom;[1] and there have been several similar instances since, where these decisions have been acted upon.

Formerly such foreign marriages had to be proved by sending commissions abroad at very great expense and delay.[2]

Of course if, for whatever cause, satisfactory written proof of marriage is not available, either by loss of the Colonial Register, or if the parties got married before the Order in Council was passed, or a marriage was contracted elsewhere than in the Colony, recourse will still have to be had to the common law for the proof of the marriage *aliunde*. Any reasonable proof of marriage, to satisfy the Court that a marriage has been contracted, shall be sufficient evidence of the marriage. Thus in the case of *Lehane* vs. *Lehane*,[3] though the adultery of the wife was proved, the Court, not being satisfied as to the proof of marriage, gave absolution from the instance. In the case of *Kemball* vs. *Kemball*,[4] the Court held as sufficient proof of marriage the evidence of a son of the parties to the suit, who swore that his parents always lived together, and spoke of each other as husband and wife; and also of another witness who swore that in certain transactions with the defendant he represented himself as the husband of the plaintiff, and that the parties always passed for husband and wife. So also the evidence of a single witness who saw the parties going to church to be married, in their wedding clothes, and subsequently live together as husband and wife, was held sufficient evidence of the marriage to support an action for divorce.[5] It would

[1] *Perfect* vs. *Perfect*; *Hack* vs. *Hack*; both decided in 1880; and *Field* vs. *Field*, decided in 1881, none of which is reported.

[2] See several examples in Menzies' Reports, Vol. 1, on "*Divorce*."

[3] 1 M., 267.

[4] 1 M., 281.

[5] *Hofman* vs. *Hofman*, 1 M., 281.

also be considered proof of a marriage, until disproved, if the parties passed for such when they ate, slept or lived together in one house as husband and wife, and were considered married people by the neighbours, and called each other husband and wife.[1]

In the case of *Hodges* vs. *Hodges*, above quoted, the Court accepted the evidence of the husband as sufficient proof of marriage.

Though it is sometimes desirable that a suitor wishing to give evidence, especially in divorce cases, should be present at the trial, the Court has allowed the party's evidence to be taken on commission on the ground of his poverty.[2] So also has the Court allowed, in the case of poverty, evidence of adultery to be given on affidavit under Rule of Court 335.[3]

Adultery is defined as "the carnal connection between two married persons, other than the husband with his wife; or between one married and one unmarried person."

The carnal connection of two unmarried persons is called either fornification or concubinage. If a person already in the married state marries another, it is called "Bigamy." The carnal connection of two persons within the prohibited degree of marriage is called "Incest." A person, therefore, who, while his marriage still subsists, again marries, and within the prohibited degrees, is guilty of the three crimes of "Bigamy," "Incest," and "Adultery."

By marriage the parties are presumed to have given a final pardon to each other of all ante-nuptial errors, and therefore no action, as a general rule, can be maintained for adultery or concubinage committed before marriage. But from this rule is excepted the case of the *previous* "*stuprum*" of the woman unknown to the man,[4] but see this subject more fully treated under the heading of "Stuprum" further on.

Van der Linden[5] says:—

"The crime of adultery is consummated when the external acts which nature has prescribed for the union of the two sexes have been performed, although that which is necessary for impregnation may not also have taken place."

[1] Hol. Con., Vol. 1, Con. 55; and Merula, 4, 73, 1, n. 10.
[2] *Eyth* vs. *Eyth*, 6 C. T., 33.
[3] *November* vs. *November*, 7 C. T., 334.
[4] Berg, Ned. Adv. Bk. Vol. 1, Con. 100.
[5] 2, 7, 2.

This, like the definition of adultery, does not fully cover the whole ground, which can best be seen from the examples here given. Direct evidence of the fact of adultery is, of course, very rare, and is never required, but there must be such positive proof in the way of circumstantial evidence as to make the presumption probable. The proximate acts may be such as the parties having been found very near each other, and apparently surprised, rising hastily, one running one way and the other another, dress disarranged, confusion, hesitancy, embarrassment; all these are strong evidence of guilt, especially if the circumstances cannot be satisfactorily explained by them. On the other hand, flirtation, kissing, walks, drives, presents exchanged, are in themselves no evidence of guilt of any kind, especially among relatives and old friends. But these, coupled with indecorum or impropriety, especially in a woman, and if repeated after warning, are, although not conclusive proof, strong presumptive evidence of criminality. If, then, any of these can be confirmed by other evidence, such as frequent interviews, favourable opportunities, and, from the situation and character of the parties, their general conduct and behaviour and so on, tending to misconduct, these circumstances must, like all circumstantial evidence in other cases, be considered by the Court; and the Court must be satisfied from the various occurrences and events, when put together, that they can lead an unprejudiced mind, acquainted with the ways of human nature, to no other reasonable conclusion than that adultery has been committed. If, on the other hand, the circumstances of the case can, with good reason, be accounted for on the hypothesis of innocence of adultery, although perhaps otherwise indiscreet, then effect must be given to such construction. The Court must, however, be satisfied that if all the facts and circumstances taken together are not capable of reasonable innocent interpretation, the conclusion of guilt is inevitable. No hard and inflexible rule can be laid down. The only general rule that can be observed on the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion that the offence has been committed. For instance, in the case of gross in-

decorum, improper and undue familiarities, if totally incapable of being justifiably accounted for, opportunities of privacy, and when the privacy is frequent, and when indelicate acts have passed between the parties, the presumption is that adultery has been committed, on the proof that there have been opportunities of effecting it if the parties were so disposed.

A "*confession*," or admission of adultery, though on pleadings or on oath, is in itself insufficient; for adultery is about the only offence which cannot be taken notice of by Courts of law by the bare admission of either or both of the parties, but must be proved by other evidence. For such confessions and admissions may often be made for the sole purpose of getting a dissolution of the marriage tie, though no actual offence may have taken place; and this rule is so imperative that, though the confession be made under apprehension of death, yet it cannot be admitted.[1] But the confession of adultery, though afterwards denied by the party, is in the discretion of the Court to admit, or not, and to take in conjunction with other circumstances. Thus, where the woman was found on two or three occasions in her bedroom with the same man under suspicious circumstances of very great impropriety, the Court held the offence complete.[2]

So also the unsupported evidence of the woman with whom the adultery is alleged to have been committed is not sufficient by itself to prove the adultery.[3]

"Correspondence" is of itself no suspicious cause; but as to how far it will establish guilt must depend upon the nature of the letters.

Though it is necessary to allege in the summons and declaration, where it can be done, the time and place, and the person with whom the alleged adultery took place, yet there may be instances, as in the following examples, where this cannot be done; but the Court must be satisfied that the charge of adultery is probable, and that the evidence leads to a fair and natural conclusion that an act of adultery

[1] *Wylde* vs. *Wylde*, 1 M., 269; *Van der Westhuysen* vs. *Van der Westhuysen*, 4 C. T., 389.

[2] *Wilde* vs. *Wilde*, decided in 1889, not reported.

[3] *Weyers* vs. *Stopford*, 1 M., 273; *Horn* vs. *Horn*, 9 C. T., 664; and see Chapter "*Affiliation*."

has taken place between the parties at some time or another.

When a declaration for divorce alleges certain acts of adultery between certain dates, and the defendant is in default, no amendment of the declaration can be made so as to produce evidence of adultery prior to the dates alleged, without notice to the defendant.[1]

If the adultery is denied, and a "condonation" is pleaded, then dates and places as to when and where both acts are alleged to have taken place become very important. It is for this reason that the law requires them to be given, where possible; and also the name of the party with whom the adultery is alleged to have been committed, so as to test more accurately the probabilities of the plaintiff's charge.

There are several instances where no evidence of adultery is required, but is presumed without any other evidence from the nature of the occurrences. For instance, if a married woman should be delivered of a child a year, or longer, after her husband had been abroad, or within such a period after his return as to make it impossible that he could be the father of her child; or if the parties were so circumstanced as to have had no intercourse with each other.[2] But under such circumstances it must be proved that the husband has had no access to his wife during that period.

A woman going to a brothel with a man, unless satisfactorily explained, is conclusive evidence against her of adultery.[3] Also his admission to her bed-chamber at night, on a frivolous plea of illness, is strong evidence of criminality.

The consorting of a married man with a prostitute raises the presumption of adultery, unless he can justifiably account for it and rebut it. The introduction of a person clandestinely to one's home at night is evidence of adultery unless it can otherwise be satisfactorily explained. The fact of the man having venereal disease long after marriage is *primâ facie* evidence of adultery. If he can clearly prove it to be a relapse of an ante-nuptial offence, no after-offence can be

[1] *Klaase* vs. *Klaase*, 7 J., 157.

[2] *Wylde* vs. *Wylde*, 1 M., 269; *Richter* vs. *Wagenaar*, Ibid, 262; *Baker* vs. *Baker*, Ibid, 265.

[3] *Villa* vs. *Villa*, decided 1891.

imputed to him, but the burden of proof lies on him, otherwise the presumption is a post-nuptial adultery. In such a case the Court has the right to ask the woman who brings the action for divorce on the sole ground of her husband having communicated the disease to her, whether she herself has not been guilty of adultery since the marriage.[1] This was the first case decided in this Colony in which the wife brought the action for divorce some time after marriage, on the sole ground that her husband had conveyed the disease to her, from which she inferred the adultery. Medical testimony having confirmed the complaint of the wife, and the husband not being able to prove that it was the result of an ante-nuptial offence, the Court granted the divorce.[2]

A person alleged to have been married in this Colony, but not marrying according to the requirements of the Colonial law, such as are the reputed marriages among most of the Malays and the Natives, though married according to the Malay or Native customs, is not entitled to an action for divorce, or to recover damages from a person who has had carnal connection with such Malay's or Native's wife.[3] As to a Kafir marriage under Kafir law, see *Dantile* vs. *M'Tirara*.[4]

In bringing an action for divorce there should be no "*collusion*" between the parties. By collusion is meant here an agreement, or mutual understanding, between the parties, for the one to commit, or appear to commit, an act of adultery in order that the other may obtain a remedy at law as for a real injury. Therefore, any co-operation to effect such a purpose is a bar to a divorce; and collusion cannot be presumed, but must be proved.[5]

"*Condonation*" is also a bar to a divorce. It is the "forgiveness of a conjugal offence, with a full knowledge of all the circumstances." Yet condonation, like collusion, cannot be presumed, but must be clearly proved, and must have

[1] *Lee* vs. *Lee*, decided in 1880, not reported.

[2] See also *Garton* vs. *Garton*, 9 C. T., 683.

[3] *Nanto* vs. *Malgaas*, 5 J., 108; *Queen* vs. *Wells*, 1 A., 1; *Queen* vs. *Lodewijk*, Ibid, 365; *Brown* vs. *Brown's Executors and another*, 3 S., 313.

[4] 9 J., 452.

[5] *Van Dyk* vs. *Van Dyk*, 1 M., 278; *Esterhuysen* vs. *Esterhuysen and Greef*, 3 C. T., 245.

been followed by conjugal cohabitation;[1] for conjugal cohabitation, with a knowledge of the adultery, is a tacit presumption of the condonation of the crime.[2] As condonation is only a conditional forgiveness, it does not take away the right of complaint in case of a repetition of the offence after the reconciliation. The mere fact of either spouse continuing to live under the same roof after knowledge of the other's offence does not constitute condonation, of which the Court must be satisfied from all the circumstances why the parties continue to live under the same roof though having no sexual intercourse.[3]

The absence or desertion of the husband, leaving his wife unprovided for, is no excuse for her committing adultery in order to maintain herself, or for any other reason—such as presuming his death.[4] Nor is the desertion of the wife a cause or excuse for the husband's adultery.[5] For the general principles of the English law, which are very much like our own on "Adultery," "Condonation," "Collusion," and "Connivance," the student can, with great advantage, consult Browne's "Divorce and Matrimonial Causes," Ed. 4, pp. 94–124, and 300–308.

When both parties are guilty of adultery without the one having forgiven the other, it is also a bar to a divorce.[6]

No case for divorce, or indeed any case, can be tried privately, or *in camerâ*, whatever the reasons for it may be.[7]

Though a defendant in a divorce suit may be in default as to his appearance or plea, he should have the usual notice of trial.[8]

Divorce is also barred in the following cases:

(*a*) When a wife not of her own accord, but forced against her will, commits adultery; as for example, the rape of Lucretia.[9]

(*b*) If the wife, not knowing and being *bonâ fide* deceived,

[1] *De Wet* vs. *De Wet*, 1 M., 268; and *Seaward* vs. *Seaward*, 1 S., 247; *De Jongh* vs. *De Jongh*, 8 C. T., 77.

[2] Sande, 2, 6, 2.

[3] *Niemand* vs. *Niemand*, 8 C. T., 254.

[4] *Farmer* vs. *Farmer*, 1 S., 227; and *Goodison* vs. *Goodison*, B. for 1874, p. 143.

[5] *Hasler* vs. *Hasler*, 6 C. T., 413.

[6] *Wiesel* vs. *Wiesel*, B. for 1877, p. 92.

[7] *W.* vs. *W.*, 7 J., 104.

[8] *Niehaus* vs. *Nieuhaus*, 1 C. T., 138.

[9] Shakespeare. See also Hol. Con., Vol. 1, Con. 334.

has connection with another man believing him to be her husband; or the husband likewise with another woman.[1]

(*c*) If the wife, in consequence of the long unknown absence abroad of her husband, believing that he is dead, marries another.[2]

(*d*) By prescription of five years after the adultery was committed, if no complaint has been made, but the parties continue to live together without cohabitation and do not separate from each other.[3]

This differs from condonation, where cohabitation must have followed.[4]

But where the parties are separated, and do not cohabit together, then the mere delay to bring the action for any number of years does not constitute a condonation, and is no bar to divorce, and the prescription in such a lapse of time can only be by the usual long period of a third of a century.[5]

A judicial separation is no bar to a divorce by reason of adultery committed during the separation, nor before it.[6]

By the old law a husband was justified in killing his wife and her paramour if caught in the act of committing adultery, but he must do so *then and there*, and could not wait till his wrath had appeased, or for another opportunity; nor could he kill, unless they were caught in the act. This view is held as being good law by a large number of eminent Dutch writers.[7]

But there are other contemporary writers, entitled to equal respect, who hold the opposite view, and give their reasons for dissenting.[8] Thus Schorer[9] says—

"It is not lawful for a husband to slay his wife caught in adultery together with the adulterer. . . . But if, urged by his just grief, he has proceeded to this extremity, some excuse will have to be made for human frailty, so that he will have to be punished, not with the ordinary penalty . . . . but less severely. Adultery is not a capital crime at the present

[1] See also Jacob and Leah's case, Gen. xxix., 23; also Kersteman, Tit. "Dissolutie."

[2] See heading "Long Absence," *infra*.

[3] Damhouder Prac. Civil, p. 51; Schorer, § 518.

[4] Berg. Ned. Adv. Bk., Vol. 1, Con. 118.

[5] *Farmer* vs. *Farmer*, 1 S., 227; and *Van Dyk* vs. *Van Dyk*, 1 M., 278.

[6] See Chapter "*Judicial Separation*."

[7] Grotius, 3, 33, 9; Hol. Con., Vol. 1, Con. 331; Van Leeuwen, 4, 37, 8; and Van der Keessel, 799.

[8] Groenewegen, 9, 9, 4.

[9] In his Notes to Grotius, 469.

day, and private individuals would thus have the right to punish more severely than the Courts of law. . . . . But in the case of a forcible adultery, then the husband has the right of killing the paramour. . . . . And so also if the adultery is repeated after three warnings. . . . ."

Van der Keessel,[1] a later writer, on the other hand, says :—

"The killing of an adulterer discovered *in the act*, by a father or a husband, is to be excused on the ground of justifiable anger. And this rule is not affected by the circumstance that at the present day adultery is not capitally punished, on which insufficient ground Groenewegen argues in favour of the contrary opinion."

The majority of the writers hold the view adopted by Van der Keessel. But in the case of the *Queen* vs. *Mahomet Aleen*, alias *Pasco*, tried in the Supreme Court on the 12th day of November, 1883,[2] for the murder of his alleged wife and her paramour, the Chief Justice in charging the jury, *inter alia*, said :—

"No person is justified by the law of this Colony in killing his wife, even if he sees her in the act of adultery. It is quite true it would not be murder, but culpable homicide. This law recognises the frailty of human nature, and so, where a man in a sudden transport of passion kills his wife upon his discovering that she is unfaithful, and in the act of committing adultery, it is a case of culpable homicide and not of murder; and those authorities who say that under such circumstances a prisoner would be lightly punished are perfectly correct. I think no Judge would, under such circumstances, pass a severe sentence. But there is a wide difference between the case of finding a wife in the act—which naturally would produce extreme passion—and a case in which there is only a suspicion of adultery, or even strong reason for concluding that there had been adultery. In the present case strong suspicion must have been aroused, but this is the most that the evidence amounts to. I do not think any authority can be found in our law for the proposition that the man, even having strong grounds for believing his wife to be guilty of adultery, is justified in killing her. Now, as I have already said, the case for the defence is founded upon two assumptions: that these parties were legally married, and that the prisoner found them in the act of adultery. If you find that either of these assumptions is not supported by evidence, I am bound to tell you that it will be your duty to find the prisoner at the bar guilty of murder. . . . . But I am bound to tell you that upon this evidence you would not be performing your duty if you were to acquit the prisoner altogether."

[1] Thes. 799. [2] 2 J., 427.

By the Mosaic law a divorced woman might marry another man, but could not marry her former husband.[1] In the beginning of the Christian era it was forbidden her, and under the Gospel dispensation, to re-marry at all.[2] But by our law she may re-marry her former husband, or may marry any other person, but parties who have committed adultery cannot marry each other.[3] By the Placaat of the 18th March, 1656, Art. 83,[4] it is provided "that no adulterer or adulteress shall, until after the death or re-marriage of the innocent party, marry the person with whom he or she committed adultery." But this section of the Placaat was amended by the Placaat of the 18th July, 1674,[5] which enacted that

"people who have committed adultery may *on no account* marry each other, on penalty of nullity of the marriage, and they shall also be subject to arbitrary punishment over and above the punishments and penalties enacted against it by the written law."

I am aware of many instances in this Colony where the parties who have committed adultery have, on the dissolution of the former marriage, married each other, and that this is connived at, and in many cases even encouraged by others as well as by clergymen, on the ground that it would be better they should be married than openly live in a state of adultery. But whoever does so marry is liable to the penalties of the Placaaten which are still in force with us.

In the case of *Daniels* vs. *Daniels*[6] the adulteress (Mrs. Williams) who had married the man with whom she had committed adultery, afterwards sued him for divorce on the ground of the nullity of the marriage; but the Supreme Court would not grant the decree of nullity, on the ground that she must be presumed to have known that she was doing an illegal act, and therefore would not allow her to take advantage of her own wrong.[7]

By our law the same causes that are allowed to a husband to divorce his wife are allowed also to the wife to divorce her husband. But by the law of England the husband has

[1] Deut. xxiv., 2 and 4; Jer. iii., 1.
[2] Matt. xix., 9.
[3] Berg. Ned. Adv. Bk., Vol. 3, Con. 265; and Hol. Con., Vol. 1, Con. 307.
[4] G.P.B., Vol. 2, p. 2429.
[5] G.P.B., Vol. 3, p. 507.
[6] 3 J., 231.
[7] See also Schorer's Notes to Grotius, 1, 5, 16.

greater privileges. There simple adultery on the part of the wife is a sufficient ground for the husband to obtain a divorce. But if the husband is the defendant, then the wife must prove either adultery, coupled with desertion without reasonable excuse for two years; or adultery coupled with cruelty, bigamy, rape, or an unnatural offence.

By our law, as well as by the law of England, the husband has an action for damages against the man who committed adultery with his wife, but when there has been no marriage such as is required by law, there can be no such action.[1]

In England the wife's paramour, there called the "co-respondent," must be joined, if he can be found, as a defendant in the action for divorce, and on the divorce being granted, the damages are thereupon assessed. With us, however, the paramour is not necessarily joined in the action for divorce; indeed, unless he is sued for damages, there is no need at all that he should have any knowledge of the action for divorce: the two actions, if brought, may be separate, the one for divorce, and the other for damages, but they may be brought simultaneously, and tried on the same day, or consolidated and tried at the same time. In recent years the actions have been joined.

Up to the time of the case of *Oliver* vs. *Oliver and Peckover*, in February, 1891,[2] the two actions were always separate. In that and several subsequent similar cases, the actions were joined, but on an exception being pleaded in the case of *Biccard* vs. *Biccard and Fryer*, that the two actions should have been severed and not joined, the Court decided[3] that

"the exception could not be sustained, as no possible injury could be done "to either defendant by joining them as defendants in the same action, "for if there had been adultery between them, then they were co-partners "in their guilt and they were properly joined together in the action."

It is preferable, therefore, that these actions should be joined, so that all the points might be gone into, and so also save expense.

In England, formerly, the divorce must first be decreed before the damages could be assessed, and no damages could

[1] *Nanto* vs. *Malgaas*, 5 J., 108.
[2] 1 C. T., 51.
[3] December, 1892, 9 J., 473.

follow if the divorce were not granted; but damages can now be sued for without instituting the action for divorce.[1] With us the Supreme Court has granted damages, though the action for divorce was not even commenced.[2] The old English law was upon this point certainly preferable to the modern, for there is nothing to prevent an unscrupulous person, watching every opportunity, even perhaps with the concurrence of his wife for the sake of damages, to sue someone for damages for criminal connection with his wife, and yet never institute proceedings for divorce. The case last above quoted is an instance where to this day the plaintiff has not sued for divorce, and does not intend to do so, probably waiting for another opportunity to sue for damages. Of course, if connivance of the husband can be proved, there can be no damages sustained, for the idea of the damages is to compensate the husband, however inadequate that may be in some cases, for the loss of his wife's society.[3]

The question till recently has never been raised on pleadings, nor formally decided in this Colony, whether damages for adultery can be assessed so long as the divorce is not granted. In the cases where damages have been awarded, the action for divorce has either been simultaneous with the action for damages and the divorce granted, or the point has not been raised on the pleadings. I confess I have searched in vain for direct authorities on the point in the Dutch law. None that I have consulted goes further than Grotius,[4] who says, without qualification, that—

"a person who commits adultery with a married woman, even though with her consent, inflicts an injury on the husband, and is consequently liable for the same to her husband, over and above any damages which the husband or children may suffer thereby."

In the case of *Wagner* vs. *Kotze*,[5] the Court held the adultery not proved, and added that—

"even if it had been proved it was questionable whether the action could be decided before the husband had instituted an action for, and obtained, a divorce."

[1] *Bernstein* vs. *Bernstein*, 8 T. L. R., 697; and *Powers* vs. *Powers and Hadley*, 10 P. D., 174.

[2] *Hanson* vs. *Ringham*, decided in December, 1881, not reported.

[3] See also *Esterhuysen* vs. *Esterhuysen*, 3 C. T., 245.

[4] 3, 35, 9.

[5] Decided in the Supreme Court in June, 1865, not reported.

But the late Mr. Justice Watermeyer, on that occasion, went more fully into the subject, and said, after commenting on the case, and after having referred to the legal authorities in order to shew with what suspicion such kind of actions must be regarded :—

"The Roman-Dutch authorities know of no action of compensation for the dishonour of a man's wife. It is true there was a custom to sue the adulterer also in an action for divorce, and from him to claim damages. But it would lead to great abuse if an adulterer could be summoned for a large sum of money if judgment is given against him, and if after all the plaintiff should not proceed with his action for divorce, but continue to live with his wife with the fruits of the action recovered from the adulterer. With respect to this case, I am of opinion, after a close scrutiny of the events, that the case against the defendant was not proved. I concur with my brother Cloete, that even if the case were proved no other than nominal damages would be given."

In the case of *Hanson* vs. *Ringham*,[1] the Chief Justice made the following remarks in giving judgment :—

"Mr. Upington, on behalf of the defendant, had first contended that an action of this kind could not be brought, but the only authority he brought forward in favour of that was a *dictum* of Judge Watermeyer, but it was admitted that many cases of this kind had been brought in this Court, and I do not think that the Court would be justified in upsetting altogether the existing practice. Besides, the authority of *Grotius* was quite clear that the husband might bring an action for damages in a case of this kind. The sole question, therefore, was what amount of damages should be awarded."

But in the case of *Nanto* vs. *Malgaas*, above quoted, the Chief Justice said :—

"I am by no means satisfied that under our law a husband can maintain an action for damages against an adulterer with his wife without suing her for divorce. If such actions were allowed husbands might, in collusion with their wives, reap a high reward from the continued unchastity of their wives. But this question does not now come up for decision, seeing that in our opinion there was no binding marriage at all."

But owing to the *dicta* here mentioned of the two learned and able judges to whose utterances the greatest respect has always been paid, the question whether damages for adultery can be assessed so long as the divorce is not granted was

[1] Decided in 1880, quoted above.

specifically raised on the pleadings in the case of *Biccard* vs. *Biccard and Fryer*, quoted above, and now decided by the Supreme Court, in the affirmative. The following is an extract of the Chief Justice's judgment :—

"A preliminary question was raised yesterday as to whether damages ought to be given at all where a decree of divorce had not first been obtained. A passage has been put in by Mr. Sheil on behalf of defendants, giving the judgment of Judge Watermeyer in the case of *Wagner* vs. *Kotze*."

[His Lordship here read the judgment in Wagner's case, and also in the subsequent case of *Nanto* vs. *Malgaas*, 5 J., 108.]—

"I wish to make it clear that my opinion is not that such an action cannot under any circumstances be brought without also bringing an action for divorce, because there may be such cases where the parties being Roman Catholics there would be conscientious scruples against bringing an action for divorce, and yet parties might intend to be separated for the rest of their lives. The remarks quoted would not apply to such a case. If the Court were satisfied that the breach was final, and that there was no intention on the part of the husband to reap the fruit of his wife's adultery, I should say that the reason of the rule would fail, and the Court might under such circumstances grant damages without decreeing divorce. But the case must be very exceptional indeed which would justify any Court or jury in giving damages for the wife's adultery, unless it is quite clear that there is a final breach between the parties, and that the wife was not to live again with the husband, nor the husband to reap the fruits of her unchastity. In the present case, it is clear that the plaintiff does intend to be divorced from his wife for the future, and the only question is the amount of damages to be awarded."

The measure of damages is entirely in the discretion of the Court, and must be judged of as in all other cases of damages. The rank, social position, and education of the parties, the pecuniary means of the "co-respondent" (to use the more familiar expression of the English law), the efforts he made, and the art and means he adopted, to get the wife into his power, her chastity and modesty before her fall, her good name and fame till then, and the fact of her offence being the first of its kind—these are strong grounds for the Court to give heavy damages. On the other hand, if the parties are of humble birth and social position, uneducated and poor, and not of high and refined feelings, however

respectable they may be, the measure of damages is proportionably less. In the case of *Bell* vs. *Stewart* (decided in 1850), the damages were laid at £2,000, but the Court awarded £500 with costs. In the case of *Hanson* vs. *Ringham* (quoted above) the damages were laid at £500, but the Court awarded £100 and costs. In the case of *Sheppard* vs. *Kretchsmar* (decided in 1889) £250 was claimed, but £25 only awarded.[1]

The question of costs in such cases is also entirely in the discretion of the Court. Thus where a co-respondent has misconducted himself with a woman in ignorance that she is married, and continues to live in adultery with her after being informed of the fact, he will not necessarily be condemned in costs.[2]

2. THE COMMISSION OF AN UNNATURAL CRIME.

This means either sodomy or bestiality. Though both by the English and the Dutch law sodomy applies to the carnal connection of a man with man, or a man with any other animal or beast, or with any woman (*per anum*), yet bestiality is the term more properly used when a man commits this offence with any of the brute creation. By the Mosaic law the brute, or beast, with which this offence was committed must be destroyed; but by our law there is nothing to warrant this being done. The punishment for this offence by the Dutch law is death;[3] and I know of several instances where such a sentence for this crime has been passed also in this Colony, though at the present time this sentence is not carried out, and the Courts now invariably inflict a discretionary imprisonment with hard labour, and with or without lashes. By the law of England the penalty is penal servitude for life as a maximum, and for ten years as a minimum, punishment.[4]

It is no doubt on account of the repugnant nature of such a crime that the law of Holland allowed the innocent spouse

[1] None of these cases are reported.

[2] *Robinson* vs. *Robinson and Wilson*, 78 L. T., 391.

[3] Van der Linden, 2, 7, 7.

[4] Stephen's Crim. Law, Chap. 18, Art. 168.

to obtain a dissolution of the marriage.[1] The English law on this subject is the same as with us.[2]

I know of no case where a divorce has been applied for in this Colony on the ground of sodomy. The law is, however, clear, and is still in force with us. The summons and pleadings in such a case must set forth the facts in the same manner as in the other cases for divorce, and though the defendant be convicted, yet the sentence is in itself not sufficient evidence for the purpose of the divorce. The plaintiff will still have to prove the grounds of complaint independently of the conviction. It is the same by the English law.

3. PERPETUAL IMPRISONMENT.

Under this heading, as under the former, so far as I am aware, no case has been decided in this Colony, certainly not since 1859, in which a divorce has been applied for on the ground of perpetual imprisonment. That such, however, is the law, and is also in force with us, there is not the slightest doubt.[3]

Schorer[4] and Merula[5] say "that a wife whose husband has been condemned to the gallows may be regarded as a widow," the reason given being, "that she has a useless husband and that such a man is regarded in law as civilly dead." This, of course, applies also to a husband whose wife has been condemned to imprisonment for life.

There are two cases reported in Holland on this subject. The first is that of Maria Van Driel, who was married to Adrian Maranisz Karmans. This case does not appear to have been judicially decided by the Court, but the plaintiff petitioned the States of Holland, setting forth her marriage, and that her husband had in 1722 drowned his own child by a former marriage, and had fled to escape punishment; that

[1] Van der Linden, 1, 3, 9; Van der Keessel, 88; Schorer, 1, 5, 16; Merula, 4, 2, 10, 8.

[2] Pritchard's Handbook of Marriage and Divorce, Chap. 9, p. 106, and Chap. 2, p. 140; Tichwell's and Little's Law of Divorce and Matrimonial Causes, p. 225; and Browne's Divorce and Matrimonial Causes, pp. 30 and 53.

[3] Van der Linden, 1, 3, 9; Van der Keessel, 89; Gail, 1, 1, 44.

[4] 1, 5, 16.

[5] 4, 2, 10, 8.

he was thereafter, in his absence, tried and convicted, and sentenced, if found, to be broken alive on the wheel; and she therefore prayed the Court that whether he was dead or alive, or found or not, the marriage between her and him might be dissolved, and she be at liberty to marry again whomsoever she pleased. This prayer was duly granted by the States of Holland on the 30th of December, 1732.[1]

The second case, and by far the most important, and which would amply repay a careful study, is reported by Van der Linden in his Gewysdens.[2] It is that of Lysbeth Cornelis Zuidan against her husband, Kryn Kalkman.[3] Kalkman was a night watch, and becoming unduly intimate with a woman called Dronke Pieternel, joined her in committing arson, for which they were tried, found guilty, and condemned to be fastened to the gallows by their necks with a halter, to be severely whipped with rods, then branded with the double sword, and to be thereafter confined with hard labour for life. Lysbeth first applied to the States of Holland for a dissolution of the marriage, but was referred to the Ordinary Court of Justice. Here she applied for a *curator ad litem* to her husband, which was granted, and she brought her action. In her declaration she concluded with the following prayer:—

> "That the bonds of marriage subsisting between her and her husband may by sentence of the Court be declared dissolved, by reason of the perpetual imprisonment . . . . against the defendant, and that the plaintiff may be permitted, if so minded, to marry another."

The case was defended by the husband, assisted by his curator, and on the 26th July, 1793, the Court gave judgment in his favour with costs. From this judgment an appeal was made to the High Court of Holland, which, on the 12th November, 1793, reversed the decision of the Court below with costs, and declared the said marriage dissolved by reason of the perpetual imprisonment, and Lysbeth was further declared at liberty to marry whomsoever she pleased.

[1] G.P.B., Vol. 6, p. 540.
[2] Vol. 1, p. 247, Case 32.
[3] Decided by the High Court of Holland in 1793.

4. LONG UNKNOWN ABSENCE.

When either of the spouses has not heard of the other, or does not know of his or her whereabouts, for a period of five years, it is a good ground to entitle the innocent spouse to re-marry. The Placaat of Charles V., of the 18th March, 1656,[1] says:—

"Thus, when either spouse, in the interest of the State, or to transact private affairs, is obliged to go to a foreign country (or far away) and there remains a long time, whether through illness, or imprisonment, or for any other cause, so that no tidings can be obtained of or from him or her, it shall be permitted to the deserted (or innocent, *de verlatene*) spouse, without re-marrying, to wait the period of five years, according to the customary law, and after that time the Court may, upon due enquiry, permit the deserted spouse to re-marry."

The Court does not cancel the existing marriage, but only permits the innocent spouse, after the lapse of five years, to re-marry without being liable to the consequence of a prosecution for bigamy, or to be sued for adultery. But during these five years the innocent spouse (that is, *de verlatene*, the one who remains at home) must not have heard, or must not know, of the whereabouts of the absent spouse. Such a re-marriage is, however, to use a happy expression of the English law, *voidable;* that is, not necessarily void *ab initio*, but may become and be regarded as void only if the absent spouse turns up and insists upon having his or her spouse back; because, argue the Theological Jurisprudents, "the first marriage is restored by virtue of the return of the husband or wife, in the same way as restoration is taken of lands, houses, &c." In such a case the second husband or wife must give him or her up. Such a second union being, however, entered into *bonâ fide*, no charge of adultery or bigamy can be made against the innocent spouse; and the children born of such union are legitimate, though the spouse re-marrying may be compelled to return to the first one. If, however, the first (or returned) spouse does not insist upon claiming the other back, the second marriage

[1] G.P.B., Vol. 2, p. 2446, § 90.

would remain good, and he or she may also re-marry by leave of the Court. In this application to the Court by the returned spouse he or she prays for leave to re-marry, and in addition thereto (unlike the innocent spouse) prays that the first marriage may be set aside. If the returned spouse insists upon having the other back, the latter is bound to return, and his or her second marriage then becomes a nullity. If the spouse refuses to return, the other can sue for divorce to cancel their own previous marriage. But in any case the children born of the second marriage remain legitimate. If, however, the innocent spouse had re-married, not only on the ground of the well-known absence of the other, but because he or she had good reason to believe, from the information or evidence received, that the absent spouse was dead, then the latter could not compel the other spouse to return, nor sue for divorce, and the second marriage would still remain good.[1]

It is no doubt owing to the strict interpretation in ancient days in Holland of the rule requiring proof of malicious desertion *ab initio* that the innocent spouse (the one remaining at home) petitioned for leave to re-marry, on not hearing of, or from, the other for five years, instead of suing for malicious desertion. In this Colony the former is now never resorted to, but recourse to the action for malicious desertion is always had.[2] The only case which came before the Supreme Court for leave to enter into a fresh marriage was refused on the ground that the Court could not judicially declare, on the evidence, that the man was dead.[3] Hence the preference of and greater security in suing for malicious desertion.

By the law of England, however, the unknown absence of either spouse for a period of seven years entitles the innocent one (who remains at home) to re-marry without leave of the Court, and without the risk of being claimed back by the returned spouse, or of being sued by him or her for divorce.[4]

[1] Van Zurck, Codex Batavus, Tit. "Huwelyk," § 29; Huber, Hed. Regts., 1, 6, §§ 7 and 8; Loenius, 78; Van Alphen's, Vol. 1, p. 60, and Vol. 2, p. 589; Van der Keessel, 64 and 65; and Cos. over de Boedelmenging, p. 244, Chap. 7, § 13.

[2] See Chapter "*Malicious Desertion.*"

[3] *Re Booysen*, F., 187.

[4] Stephen's Com. of the Laws of England, Vol. 4, Bk. 4, Ch. 12.

There is a popular impression in this Colony among many people that this part of the English law is in force in this Colony, and, on the strength thereof, many marriages have taken place without any reference to the Court. All such marriages are, however, void *ab initio*. This branch of the English law is not in force here, but the said Placaat is still the law of the Colony. But, as stated in the Chapter on "*Malicious Desertion*," owing to the modern interpretation by the Court as to the meaning of desertion, instead of applying to the Court for leave to re-marry by reason of the unknown absence of either spouse, the more safe remedy of suing for malicious desertion is now always resorted to.

5. REFUSAL OF THE MARRIAGE PRIVILEGES.

If either spouse obstinately and persistently, and without any reasonable cause, refuse the other the privileges of marriage, it is also a ground of divorce.[1]

The action in such a case may be on the single ground to compel the defendant to cohabit with the plaintiff as husband or wife, as the case may be, within a time to be fixed by the Court. I am not aware of any Colonial decision on this point. In the case of *Tiffany* vs. *Tiffany*[2] the plaintiff's declaration set forth the refusal to cohabit, but it also alleged a subsequent desertion; and the decision of the Court was founded on the desertion only. But it is quite possible, and I have been consulted in cases where, for appearance sake, as they say, the parties continue to occupy the same bed or room together, but the woman from the outset refuses her husband all marital privileges and boasts that she is his "virgin wife." In such a case there can be no action for malicious desertion, in the ordinary sense of the term, but it must be for an order in future (from a given date) to cohabit with the plaintiff as husband or wife; failing which, the order for divorce would follow as in desertion cases. The delicacy and unnaturalness of the subject are probably the only reasons why we do not

[1] Cos., p. 248, § 17, and p. 225. For English cases see *S.* vs. *A.*, 39 L. T., 127; *H.* vs. *H.*, 3 L. R. P., 126; *L.* vs. *W.*, 47 L. T., 132.

[2] Decided in 1886, not reported.

hear of such actions. The disappointed spouse invariably resorts to some unkind or disparaging remarks which induce, or compel, the other to leave, and which entitle him or her to sue for malicious desertion, and thus the real cause of desertion is not disclosed. Can a husband force his wife to have carnal connection with him? Yes, if his and her health permit it? Can she force him? Yes, for the same reason. But what matrimonial bliss can there be when either party has always to force the other to yield the matrimonial privileges? But as neither party is bound to *compel* the other to matrimonial duties, it is sufficient to prove the refusal of the other in order to obtain relief.

6. CAUSES FOR WHICH A MARRIAGE MAY BE REPUDIATED AND DECLARED VOID "AB INITIO."

As stated before, there is a very material distinction between repudiating a marriage on the ground of a prenuptial offence or bar, in which case the action is to have it declared that there never was a legal marriage, and thus the alleged marriage was void *ab initio;* and bringing an action for divorce to cancel a valid marriage on the ground of postnuptial offence by either party. Under this heading I shall treat only of marriages which can be *repudiated*, and which are void *ab initio.* The causes for such repudiation are:—

(*a*) *Impotency.*—This means the incapacity, from whatever cause, on the part of either the man or the woman to procreate. If a man is an eunuch, to use a Biblical expression, or is castrated, to use the legal expression, he is not even allowed to marry, and if he should marry his marriage is void *ab initio.* But a man may be incapacitated from procreating by other causes than castration. The Court must be satisfied, from medical testimony or otherwise, that the party accused was incapable of procreation at the time of the marriage. Of course, where the defect to procreate is not visible, and there is reasonable hope or belief that in time, or by means of medical or surgical treatment, a cure is likely to be effected, a reasonable opportunity should be

allowed for it. When the defect to procreate is not visible, and is not otherwise known, or immediately ascertainable, or there is no immediate hope of success by means of medical or surgical treatment, then three years must intervene from the date of marriage before such a marriage can be set aside on the ground of impotency. This applies to the woman as well as to the man. But when the incapacity to procreate is visible or ascertainable at once, the marriage may be set aside at any time, or immediately after its celebration. Of course, if either party becomes incapacitated at any time subsequent to, though immediately after, the marriage, it is neither a cause for setting aside the marriage nor for a divorce. In a case of doubt as to the capacity to procreate, the parties should submit themselves to medical inspection by doctors or by clearly-recognised matrons or midwives. In a suit for impotency there must be proof that the party is absolutely incapable of consummating the marriage, and where the defect is not visible three years' interval is necessary before this decree can be applied for, and then only if the medical evidence shew frigidity or other incapability to have children; and there must be proof that no carnal connection took place during that period. In the case of the invisible defect of the husband, the wife alleges in her pleadings that he is incompetent "*propter frigiditatem naturalem et perpetuam impotentiam;* that they have been married three years, during which time the husband never has had carnal connection with her; that she is *virgo intacta sed capax viri*, while he is *non potuit penem erigere nec fœminam penetrare et cognoscere.*" In a case of visible defect the three years' delay is not necessary. The English law upon this subject is copied from the Roman law, and therefore the English decisions here quoted are of great assistance.[1]

[1] St. Matthew, xix., 11 and 12; *Welde* vs. *Welde*, and *Alson* vs. *Alson*, reported in Dr. Lee's Ecclesiastical Cases, Vol. 2, pp. 518, 580 and 576; *Stagg* vs. *Edgecombe*, 8 L. T., 643; *H.* vs. *H.*, 3 S. & T., 592; *H.* vs. *P.* f.c. *H.*, 3 C. R. P., 128; *Harrison* vs. *Harrison*, 14 Moore P. C. C., 96; *L.* vs. *W.*, 47 L. T., 132; Huber Hed. Regts., 1, 5, 36, and 1, 6, 6; Grotius, 1, 5, 4; The Bellum Juridicum, Case 95; Decisions of the Court of Holland, Case 106; Van Zurck, Codex Bat., Tit. "Huwelyk," § 34; *Ngwende* vs. *Ngwende*, 8 E.D.C., 68.

(*b*) *Ignorance of Previous Stuprum.*—"Stuprum" is any connection of a man and woman otherwise than in marriage or concubinage, and provided the woman be not married.

If a woman passes herself off as a virgin, not necessarily by proclaiming it, but by her conduct generally, and by retaining and being called by her maiden name, thereby leading people to believe that she is still pure; and a man, having no reason to think that she is otherwise than a virgin, marries her and then discovers that she has been carnally known by another man before her marriage, he can repudiate the marriage and bring an action for divorce to have it set aside and declared void *ab initio.* The bare fact that the woman is seemingly not a virgin at the date of the marriage is no ground for setting aside the marriage, for there may be several good reasons, such as illness, disease, accident, or a medical operation, which might have caused a perforation of the hymen, and the woman may yet be innocent, pure and chaste. Dr. Ramsbotham, in his Medical and Obstetric Surgery (p. 35), says:

"Although the presence of the hymen was formerly considered as a test of virginity, from the supposition that it was invariably broken on the consummation of matrimonial intercourse; this idea has long been repudiated, for it is now well known, not only that it may be destroyed and lost from various causes originating in disease or accident, but also that in some instances it does not give way upon the first, nor many subsequent, connections; and even that pregnancy has taken place while this membrane was entire. So that its presence can be no positive proof of personal chastity, nor its absence of immorality."

It is thus a very serious matter to lay such a charge to a woman. Her honour, purity and chastity are flowers too delicate to trifle with. They should therefore, at all times, be most sacredly regarded. Before a man makes the insinuation he should think several times, and take steps only when he has positive proof of her previous fall. For a good reason, therefore, the law has required that a man in such a case, in order to repudiate his marriage, must be able to prove that his wife has had carnal connection with a man before her marriage. It is not necessary that she should be pregnant by the other man; and if she should be pregnant by her

husband, he is not bound in such a case to support the child, the law differing in this respect from the usual law of support of bastardy.[1] The action should be, not as in divorce for a post-nuptial offence, but to have the marriage declared void *ab initio*, on account of the fraud practised on him by reason of her *stuprum* with another man before marriage.[2] The husband must swear that he had not had carnal connection with the woman before marriage; that he believed her to be a virgin, and also that he was ignorant of her previous condition. Of course, if he himself had had connection with her before marriage, he cannot after marriage repudiate her on the ground that he then discovered that she had had connection with another man also before marriage. The only case decided in this Colony on the subject is that of *Horak* vs. *Horak* in 1861.[3] In this case the proof was ample, as about four months after marriage the woman gave birth to a child, of which it was proved that it was impossible that he could be the father.[4]

By the Mosaic law such a woman was stoned to death.[5] By the Roman law the punishment was confiscation and partial forfeiture of goods.[6] By our law there seems to be no punishment provided for it beyond the social stigma attaching to repudiation of the marriage tie.

(*c*) *Insanity.*—If, either at the time of marriage, or from the general previous state of health of either party, it can be proved that either the man or the woman was not in a fit state of mind to marry at the date of the marriage, the marriage is illegal. It is not necessary to prove that the insanity was apparent to anyone of ordinary habits of observation; but the Court must be satisfied, from all the surrounding circumstances, that the party was in such a weak, imbecile, defective state of mind as to be incapable of appreciating the nature and consequences of the marriage.

Of course, if either party becomes insane after the

[1] See Chapter "*Affiliation.*"

[2] *Nel* vs. *Nel*, 1 M., 274.

[3] 3 S., 389.

[4] In addition to the authorities quoted in *Horak's* case, see also Lybrecht, Vol. 1, Chap. 12, § 16; Berg's Ned. Adv. Bk., Vol. 1, Con. 100 (*Note:* This consultation is worthy of a careful perusal); Cos., p. 226-235; Van Zurck, Tit. "Huwelyk," § 34 and notes.

[5] Deut. xxii., 13-22.

[6] Just. 4, 18, 4.

marriage, that is no ground for repudiating the marriage; and if either party is guilty of a post-nuptial offence entitling the other, to a divorce, but becomes insane before the action can be heard, then the Court must appoint a Curator to such party before the trial. The case of *Mordaunt* vs. *Mordaunt*,[1] the arguments and judgment in which I had the privilege of hearing, was on this point decided, although it was not so stated, exactly in terms of the principles of our law. Defendant's father, Lord Moncrieff, was appointed her Curator, and one of the grounds of the defence stated was that she, being insane, could not answer the action for divorce; but the Lords held otherwise.

THE PUNISHMENTS FOR ADULTERY.—Though we do not hear of any criminal prosecution for adultery, there is still such a law in force in this Colony. By the Mosaic law the penalty for adultery was death.[2] By the Roman law it was at first also death, subsequently only a temporary relegation and a partial confiscation of property. After that, again, the infidelity of the husband was not regarded as a crime, but only the infidelity of the wife, on account of the danger of introducing strange children to the husband; but Justin finally enacted that the woman should be whipped and sent to a monastery for two years, after which she was to be returned to her husband, unless he had in the meantime divorced her, in which case she was to be sent back to the monastery.[3]

By the law of Holland, which on this subject is still in force with us, the punishment in the case of two married persons committing adultery is banishment for 50 years and a fine of 1,000 guilders. In the case of a married man with an unmarried woman, he is declared infamous and fined 400 guilders; she is placed on spare diet for 14 days. On a second conviction he is sentenced to a double fine and to banishment for 50 years; she is banished for 50 years. In the case of an unmarried man with a married woman,

[1] Decided in the House of Lords in England in 1874.
[2] Deut. xxii., 22-24.
[3] C., 9, 9, 1; D., 48, 5, 6, 1; J., 4, 18, 4; Novel, 134, 10.

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[2] *Nel* vs. *Nel*, 1 M., 274.

[3] [illegible]

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[3] C., 9, 9, 1; D., 48, 5, 6, 1; 18, 4; Novel, 134, 10.

he is placed on spare diet for 14 days and fined 400 guilders; she is banished for 50 years: if repeated, both are banished for ever.[1]

The General Law as to "banishment" is derived from the following Placaaten, 16th December, 1595; 16th and 17th September, 1614; 19th July, 1607; 12th May and 25th June, 1649; 1st March, 1663; 15th April, 1761; 26th April, 1765, and 6th May, 1785. At the present time the Civil Courts do not sentence to banishment, though the law is in force here. Under Martial law banishment is at present very largely enforced: "Transportation" was not practised in Holland in the early days. Under the present Code of Holland that can be done there. Our law as to transportation is, *inter alia*, under Ordinance No. 104, Sec. 4, where a prisoner can be banished for seven years. By the Insolvent Ord. Sections 14 and 63 a prisoner can be banished for seven years, while by Sec. 40 he can be banished for life. By the English law transportation is regulated by 5 Geo. IV., c. 84, though penal servitude has now taken its place; and by 32 Vict. c. 10 in 1869, and 47 & 48 Vict. c. 31 in 1884, a system of *intercolonial transportation* is created.[2]

In England adultery is no longer a criminal offence, but only an ecclesiastical one; the punishment for which is to do penance and to be excommunicated, and to be imprisoned for a term not exceeding six months, but this punishment is in these days never enforced.[3]

FORFEITURES.—As a general rule the guilty party forfeits in favour of the innocent all benefits derived by virtue of the marriage, whether by way of dowry or marriage settlement, or community of property, and also whatever was given by the one to the other *stante matrimonio*.[4] *But this means only the benefit derived from the innocent party*, not from any other source, nor any benefits kept out of the marriage, nor any benefits specially directed by the ante-nuptial contract to go,

[1] Placaaten of the 1st April, 1580, Arts. 15–18, and 11th September, 1677; G.P.B., Vols. 1, p. 330, and 3, p. 507; see also Kersteman, Tit. "Dissolutie."

[2] See also *Rex* vs. *Mount*, L. R. 6 P. C., 283.

[3] Stephen's Dig. Crim. Law, Art. 170.

[4] Hol. Con., Vol. 1, Con. 334; and Berg. Ned. Adv. Bk. Vol. 1, Con. 118.

after the dissolution of the marriage, to any other source than the innocent spouse.[1]

The summons and the declaration should therefore specially ask for the forfeiture of the benefits, and where this has been omitted, and the Court has granted an equal division of the joint estate of the plaintiff and the defendant, the plaintiff cannot afterwards get the judgment varied so as to declare the defendant to have forfeited all benefits from the community.[2] But owing to the peculiar circumstances of the case, and the smallness of the amount and the defendant's whereabouts not being known, and that the costs due by him on the actions for divorce are more than his half share of the community the Court, on motion, decreed the forfeiture, though omitted in the summons and pleadings.[3] When the parties are married in community of property, the guilty party forfeits only his or her share in the community, but not anything he or she had before the marriage. Thus in the case of *Beyers* vs. *Beyers*,[4] the guilty spouse had about £150 when she married; she was allowed to get back this money, but forfeited her share of the joint estate, minus this £150. So also in the case of *Dieperink* vs. *Dieperink*,[5] the Court declared the defendant not entitled to her share of the community, except so far as she might have contributed any property towards the community. But where a settlement had been made of a Life Policy by the husband on the wife by ante-nuptial contract, the wife, on being found guilty of adultery, was declared by the Court to have forfeited her benefit in the Policy.[6] So also was a similar order given in the Supreme Court in the case of *Wylde* vs. *Wylde*.[7] Forfeiture can be claimed also in an action for malicious desertion.[8]

On a dissolution of a marriage, which was *in* community of property, if there is property to be divided, and the parties cannot agree upon the division, the Court will either itself divide the property, or appoint some one to do it. But if

[1] Hol. Con., Vol. 2, Cons. 51 and 138, and Vol. 4, Cons. 246 and 247; Bynkershoek, 2, 9.
[2] *Nortje* vs. *Nortje*, 6 J., 9.
[3] *Re Hodgson*, 3 C. T., 333.
[4] Decided in 1884, not reported.
[5] B. for 1877, p. 92.
[6] *Higgins* vs. *Higgins*, 5 E.D.C., 344.
[7] Decided in December, 1889, not reported.
[8] *Dawson* vs. *Dawson*, in 1892, 9 J., 446.

there is evidence satisfactory to the Court that an immediate division may have the effect of leading to an insolvency of the estate, the Court may order the estate to be handed to one of the parties, generally the innocent party, gradually to liquidate it upon such terms as the Court may think reasonable.[1] In the case of *Franciscus* vs. *Franciscus*,[2] the three eldest children were given to the custody of the father, the guilty spouse, and the youngest to the mother, who was addicted to drink, with leave to both sides to apply again for the custody of the children. A similar order was given in the case of *Warner* vs. *Warner*,[3] and the Court held that the interest of the children, in such cases, is their chief consideration. As to the consideration by the Court of the welfare of the children, see the case of *Reg.* vs. *Gyngall, re Hausherr*, decided in the Court of Appeal in England,[4] quoted in previous chapter.

The custody of the minor children of the marriage is, on a decree of divorce being granted, generally given to the innocent spouse.[5] But there may be special circumstances to justify the Court in leaving the children with some other competent person. Thus in the case of *Theron* vs. *Theron*,[6] the children were left with the paternal grandmother, with whom they had always lived and whom the father paid. In the case of *Wylde* vs. *Wylde* (quoted above) the child was left in the custody of the mother, the guilty spouse, with whom she had lived so many years during the father's necessary absence on business, but with the right to the father at any time, if occasion should arise, to apply to the Court for the custody of the child. Though the husband should be the guilty spouse and the children ordered to be in the custody of the mother, he can be compelled to support, educate, and maintain the children till they are of a suitable age, according to circumstances, to maintain themselves.[7] But whoever has the custody of the children, the guilty party is allowed at all

[1] *V. D. Westhuysen* vs. *V. D. Westhuysen*, 4 C. T., 389.
[2] 8 C. T., 56.
[3] Ibid, 87.
[4] 69 L. T., 481.
[5] *Farmer* vs. *Farmer*, 1 M., 278, and several subsequent cases not reported, for instance *Lio* vs. *Lio*, decided in 1876.
[6] Decided in 1876, not reported.
[7] See Chapter "*Judicial Separation*."

reasonable times to see them, either where they are staying, or at some other suitable place; or they may even visit him at his home.[1] But the wife having the custody of the children, cannot remove them out of the Colony without the husband's consent or that of the Court. Nor can the wife recover maintenance from the husband for the support of these children while they are out of the Colony without such consent.[2]

The costs of the action are also in the discretion of the Court; the usual rule is that the guilty party should pay the costs.[3]

When the wife either wants to institute an action against her husband, or to defend one brought against her by him, whether for divorce or judicial separation, she is entitled to claim from him alimony *pendente lite*, and also the probable costs likely to be incurred by him. Both these are entirely in the discretion of the Court, which has sometimes granted, and at other times refused, the applications. If there is clear *primâ facie* evidence of the woman's guilt, the application for maintenance and costs is invariably refused; where there is no such allegation, particularly where she is plaintiff, or where the charge against her, whether as plaintiff or defendant, is denied, and can be settled only by the Court, then the alimony allowed is in proportion to her necessary requirements, according to her station in life and her husband's means, and the costs allowed are proportionate to the probable expense of instituting or defending the action.

If the woman has an independent estate of her own, sufficient to maintain herself and meet her costs of the action, then, though it is still in the discretion of the Court to compel the husband to contribute alimony and costs, her application is more likely to be refused, or only a very small amount will be granted. Generally, when the parties have been married in community of property, the application is very rarely refused, except in a clear case of the woman's guilt. The application to the Court for alimony or costs

[1] *Wylde* vs. *Wylde*, quoted above.
[2] *Barker* vs. *Barker*, 7 C. T., 114.
[3] *Hablutzel* vs. *Hablutzel*, 1 M., 276, and *Lio* vs. *Lio*, above quoted, and several subsequent cases; and see also Chapter "*Costs*."

should fully set forth the facts in an affidavit so as to justify the Court in granting the order and a reasonable sum. On the other hand, in opposing it, evidence of the woman's independent means to maintain herself and meet her own costs, or *primâ facie* proof of her guilt, should be set forth in an affidavit to induce the Court to refuse her application.[1] In the case of *Bloem* vs. *Bloem*,[2] the Court ordered £10 to be paid towards defendant's costs, but refused the application for alimony. In the case of *Flannagan* vs. *Flannagan*,[3] the Court granted £60 for costs. In the case of *Eaton* vs. *Eaton*,[4] the Court granted £30 towards costs. In *Stage* vs. *Stage*,[5] the Court granted £25 towards costs. In the last three cases nothing was said about alimony, but it was understood that the applicant might retain for her maintenance a portion of the amount granted towards costs. In the case of *Van Blommestein* vs. *Van Blommestein*,[6] the Court ordered £150 to be paid towards costs.

With us, immediately the divorce is granted, both parties are at liberty to marry again; but in England a decree, or *rule nisi*, is first granted by which neither party may marry, formerly for 12, but now for 6, months from the date of the decree. This is to enable the King's Proctor to intervene, if he chooses, and to prevent the divorce being granted upon good grounds, such as connivance on the part of both parties, or that on the ground of the guilt of both neither is entitled to a divorce, or for any such other reason as might successfully have been advanced in the defence of the action. It very rarely happens that the King's Proctor intervenes. But with us there is no such provision; the divorce being once granted, there is no means of upsetting it, unless indeed in the unlikely event of fraud being clearly proved in obtaining it. But all the reasons that might be used in England by the King's Proctor, pending the *rule nisi*, might be successfully used here also in opposing the action for divorce.

[1] Consult Merula, 4, 37, 2, 16; Wassenaar, Vol. 1, Chap. 1, § 48; Boey's Woorden Tolk, Tit. "Alimentatie;" Pritchard's Handbook of Marriage, pp. 10–20; Kersteman's Woordenboek, Tit. "Alimentatie;" and Hol. Con., Vol. 5, Con. 145.

[2] B. for 1869, p. 68.

[3] 1 E.D.C., 42.

[4] 5 E.D.C., 236.

[5] 2 J., 229.

[6] 1 F., 81.

Summons for divorce on the ground of adultery.

(Heading.)

Command A.B. of . . . ., hereinafter called the defendant, that within . . . . days after the service of this summons, he cause an appearance to be entered in our Supreme Court of our said Colony, at Cape Town, to answer C.D. of . . . ., his wife, hereinafter called the plaintiff, in an action wherein the plaintiff claims :—

1. A dissolution of the bonds of marriage subsisting between them by reason of the adultery committed by him with one . . . . of . . . . at divers times and places, but more particularly on the . . . . day of . . . . at . . . .

2. (*If there are minor children*) For the custody of the minor children of the said marriage.

3. (*If the parties were married in community of property*) That the defendant may be declared to have forfeited his half share in the community of property existing between them, by reason of his adultery aforesaid; (*or, if they were married out of community of property, and a settlement was made by ante-nuptial contract, under which the husband was benefited; then, in lieu of the preceding clause, say*) That the defendant may be declared to have forfeited all rights, benefits and privileges to which he otherwise would have been entitled under, and by virtue of the ante-nuptial contract between them, bearing date the . . . . day of . . . .

As it is said, &c.

Witness, &c.

(NOTE.—*If the proceedings are to be by edictal citation, then proceed as follows :*)

Petition for leave to sue by edict for divorce on the ground of adultery.

(Heading.)

The petition of C.D., born . . . . of . . . .

Humbly sheweth :—

1. That your petitioner was married (*state whether in, or out of, community*) on the . . . . day of . . . . to A.B. of . . . . at . . . . which marriage still subsists.

2. That there are . . . . children born of the said marriage, both boys (girls) aged respectively . . . . years and . . . . years.

3. That the said A.B. has committed adultery with . . . . of . . . . at divers places and on divers occasions; but more particularly on the . . . . day of . . . . at . . . .

4. That he has since absconded; but whither and why your petitioner does not know: and though every effort has been made to find out his whereabouts, your petitioner has been unable to gain any information about him.

(NOTE.—*If it is intended to claim any forfeiture, then follow the clauses therein, subjoined to the Chapter on "Malicious Desertion."*)

5. Wherefore your petitioner humbly prays that your Lordships will be pleased to allow her to sue her said husband by edictal citation, by reason of his adultery aforesaid; also for the custody of the said minor children; and that your Lordships will further be pleased to give directions as to the mode of serving the citation, and all other necessary processes; and to fix the time for the defendant's appearance to the said citation.

And your petitioner, &c.

(*Affidavit of Verification.*)

In the Supreme Court, &c.
Cape Town, Wednesday . . . .

Between C.D. (born . . . .), applicant,
and A.B., respondent.

Upon the motion of Mr. . . . ., and upon reading applicant's petition and affidavit.

It is ordered,—That she be at liberty to sue her husband, the above-named respondent, by edictal citation, in an action for dissolution of their said marriage and for custody of the children of the marriage: citation to be returnable on the first day of next term, and to be served personally, if possible, and published in the *Government Gazette:* failing personal service, to be also published once in a Cape Town newspaper.

By order of the Court,

. . . . . .
Registrar.

(*Citation by edict.*)

(See note to forms in Chapter "Edictal Citations.")

(Heading of Summons.)

That whereas C.D. (born . . . .) of . . . . did, on . . . . the . . . . day of . . . ., petition this Honourable Court for leave to sue by edict, her husband, A.B., lately of . . . ., for a decree of divorce, by reason of his adultery with one . . . ., in or about the month of . . . . last, at . . . ., and on divers other occasions; and for the custody of the children, issue of the said marriage.

Now this Court, having taken the prayer of the said C.D. into consideration and granted the same accordingly, by these presents doth summon the said A.B. lately of . . . ., to appear before the said Supreme Court, on . . . . the . . . . day of . . . . at 10 o'clock in the forenoon, either in person or by proxy, to shew cause (if any) why the bonds of marriage now subsisting between them should not be dissolved by reason of his adultery as aforesaid, and why she shall not have the custody of the children issue of the said marriage.

Thus done and granted in the Supreme Court of the Colony of the Cape of Good Hope, at Cape Town, on the twenty-fifth day of November, in the year of our Lord . . . .

. . . . . .
Registrar of the Supreme Court.

. . . . . .
Plaintiff's Attorneys,
. . . . . .
Cape Town.

In the Supreme Court, &c.
Between C.D. (born . . . .), plaintiff,
and A.B., defendant.

Plaintiff's Intendit.

A.B., the defendant has been summoned by edictal citation to answer C.D., the plaintiff, in an action for divorce.

Whereupon the said plaintiff, by her attorneys, complains and says :—

1. The plaintiff was lawfully married in community of goods to the defendant at . . . . on the . . . . day of . . . .; and the marriage still subsists.

2. There is issue of the marriage two children aged . . . . and . . . . years respectively.

3. In or about the month of . . . . last at . . . ., and on divers other occasions, the defendant committed adultery with one . . . .

Wherefore the plaintiff prays :—

(*a*) That the bonds of marriage now subsisting between her and the defendant may be dissolved :

(*b*) That the plaintiff may be declared entitled to the care and custody of the children, the issue of the said marriage :

(*c*) That the defendant may be declared to have forfeited all benefits under the marriage in community of goods :

(*d*) That the plaintiff may have such further, or other, relief in the premises as to this Honourable Court may seem meet, together with costs of suit.

. . . . . .
Plaintiff's Counsel.
. . . . . .

. . . . . .
Plaintiff's Attorneys,
. . . . Cape Town.

To A.B.

The abovenamed defendant.

Take notice that you are required to plead, answer, except, or make claim in reconvention to the above declaration by the . . . . day of . . . .

next; failing which this case will be set down for trial for default of appearance and plea for . . . . the . . . . day of . . . .

Dated at Cape Town this . . . . day of . . . .

. . . .

Plaintiff's Attorneys.

(NOTE.—*On the case being called on for trial, there should be filed an affidavit that reasonable and proper efforts have been made to serve the citation on the defendant personally, but failed.*)

If he was personally served, say so. (*See form in Chapter on* "Malicious Desertion.")

Summons for divorce on the ground of adultery with some person unknown.

(Heading.)

. . . . . ., plaintiff, claims a dissolution of the bonds of marriage subsisting between them, by reason of the defendant's adultery during the year . . . . with some person or persons unknown to him; and of which carnal intercourse the defendant has been delivered of a child on or about the . . . . day of . . . ., of which plaintiff is not the father, as he has been absent from the Colony for the last 15 months, and during that time he has not seen and has not had access to his wife.

As it is said, &c.

(NOTE.—*All the other grounds for divorce for a post-nuptial offence mentioned in this Chapter, should be briefly stated as above in the summons.*)

Summons to set aside a marriage on the ground of the defendant's prior existing marriage.

(Heading.)

Command A.B. of . . . ., &c., to answer C.D. of . . . ., &c., wherein the plaintiff claims that the defendant shew cause why a certain marriage solemnized between them, on the . . . . day of . . . . at . . . ., should not be set aside as null and void *ab initio* on the ground that the said defendant was, at the time of the solemnization of the said marriage, the lawful husband of E.F. of . . . . then living.

As it is said, &c.

Summons to set aside a marriage on the ground of previous stuprum, and that the child may be declared not that of the plaintiff.

(Heading.)

Command A.B. of . . . ., &c., to answer C.D. of . . . ., &c., wherein the plaintiff claims that a certain marriage solemnized between them before the Resident Magistrate of . . . . on the . . . . day of . . . ., may be set aside and declared void *ab initio;* on the ground that at the time of the

said marriage, and without the knowledge or suspicion of the plaintiff, the said defendant had already been seduced by another man, and was pregnant by her seducer; and also that the said plaintiff may be declared to be not the father of the child given birth to by the defendant on the . . . . day of . . . .

As it is said, &c.

(NOTE.—*All the other grounds mentioned in this Chapter for which a marriage can be declared void* ab initio *should be briefly stated as above, in the summons.*)

Summons for damages for criminal conversation.

. . . . . in an action wherein the plaintiff claims payment of the sum of £ . . . . sterling, as and for damages sustained by reason that the said defendant did, on or about the . . . . of . . . ., and at divers other times between the . . . . day of . . . . and the . . . . day of . . . ., and at . . . . in the district of . . . ., wrongfully, wickedly and unjustly debauch and carnally know C., wife of the said plaintiff.

Notice of motion calling on a husband to advance a certain sum of money to enable his wife to bring (or to defend) an action for divorce, and for alimony pendente lite.

(Heading of case.)

Sir,—Take notice that application will be made to this Honourable Court, on . . . . the . . . . day of . . . ., on behalf of the above applicant, at which time you will be required to shew cause why you shall not be ordered forthwith to pay over to her a certain sum of money, to be fixed at the discretion of the Court (*or the sum wanted may be stated*), sufficient to enable her to institute proceedings against you for a divorce by reason of the adultery committed by you, on the . . . . day of . . . . with one . . . . at . . . ., in the district of . . . . ; and also to pay over to her a certain sum of money, by way of alimony, sufficient to enable her to maintain herself according to her station in life pending the said suit: and to shew cause, also, why you shall not be ordered to pay the costs of this application.

Cape Town . . . . day of . . . .

Yours, etc.

. . . . . .

Plaintiff's Attorney.

To C.D.

The above defendant.

Affidavit in support of motion.

(Heading.)

I, A.B., of . . . ., the above applicant, make oath and say :—

1. That I was married in community of property to C.D. of . . . . on the . . . . day of . . . . at . . . .

2. That there is issue of the said marriage . . . . children, to wit : . . . . sons and . . . . daughters, aged respectively . . . . years and . . . . years.

3. That I intend to institute an action for divorce against my said husband on the ground of his adultery with . . . ., on the . . . . day of . . . . at . . . ., and on divers other days and at divers other places, but that I have no means wherewith to carry on my action, nor to maintain myself pending the suit.

4. That my husband . . . . (*here state professional calling to shew his social position and income, as for instance*) is a speculator, and he has frequently informed me of the moneys he had made ; and I estimate his annual income to be about £ . . . . sterling ; in addition to this the respondent owns a house at . . . ., unmortgaged, and worth about £ . . . . sterling.

Sworn at . . . ., etc.

CHAPTER XXXI.

APPEALS.

FROM the earliest ages, in all countries, the right of appeal from an inferior to a superior has been claimed and allowed. This appeal was in some countries to the Chief Ruler, as among the Israelites; in other countries, as in Rome, it was, at different times, either to the populace, or the Prætor, or the Emperor, and later to special Courts of law.

In all civilised countries at the present day appeals are made to the law Courts. In ancient times the object of an appeal was not, or very rarely, to settle a doubtful point of law, but almost always to decide on facts, on the alleged ground that some gross injustice had been done to the appellant by the Court appealed from. At the present day an appeal is rarely on facts alone, but chiefly on a point of law. The object of this Chapter is to exemplify appeals to, in, and from this Colony, and the processes connected therewith. To simplify the subject I shall divide it into several heads:—

a. Appeals in General.
b. Appeals from the Special Justices of the Peace.
c. Appeals from Consular Courts.
d. Appeals from Magistrates' Courts.
e. Appeals from the Circuit Courts.
f. Appeals from the High Court of Griqualand West.
g. Appeals from the E. D. Court.
h. Appeals from the Supreme Court to the Privy Council.

a.—In General.

The Supreme Court of the Colony is also the Court of Appeal from all the other Courts in the land, and consists of the Chief Justice and two Puisne Judges specially assigned to the Supreme Court, but any of the Judges of the E. D. Court and High Court of Griqualand West may take part in the determination of any cause, civil or criminal, which may be brought in appeal before the Supreme Court.[1] The decision of the majority is binding,[2] but if the appeal be against the *unanimous* judgment of the *full* E. D. Court, or the *full* High Court of Griqualand West, such judgment *must be affirmed*, unless three or more of the Judges sitting in appeal shall concur in reversing or varying it.[3] It follows, therefore, that the three Judges of the Supreme Court can reverse the judgment of the three Judges of the E. D. Court, or of the three Judges of the High Court of Griqualand West. This may seem to some invidious, but I have frequently found that the only satisfaction those who object to this system have is, that it is the same in England, where it is of frequent occurrence for three Judges of a higher Court to reverse the decision of an equal number of Judges of a lower Court. But in England, as well as in this Colony, the Chief Justices of the Appeal Courts have frequently invited Judges of the lower Courts to take part on appeal in important cases, and a few years ago, in England, twelve Judges took part in an appeal in a criminal case; while with us special provision is made for it by the Act.[4]

As a general rule, every suitor who feels aggrieved by a judgment has a right of appeal to a higher tribunal from any *final* judgment, decision, sentence, or order of a lower Court, and the appeal must be noted and prosecuted within the time fixed by the rules of each Court.[5] It is a universal rule of law that, unless the Court appealed from orders otherwise, then, pending the decision of the appeal, the rights of the parties must not be changed.[6] It is also a general rule in

[1] §§ 7 and 20 of Act 35 of 1896.
[2] § 33, Charter of Justice.
[3] § 21.
[4] § 20.
[5] Van der Linden, 3, 1, 5, and 3, 6.
[6] D., 49, 7, 1; C., 7, 62, 3.

appeal cases that costs follow the result, but there may be circumstances which justify the Court in departing from this rule; for instance, where the appellant does not succeed in a material variation of the judgment.[1]

No appeal lies from a sentence given against a party who is in default, or who is in contempt for non-performance, nor is an appeal allowed from a provisional sentence,[2] nor from an interlocutory order, except by the special leave of the Judge pronouncing such order.[3]

Any one of a number of parties to a suit may appeal without the concurrence of the others;[4] and there may also be a cross appeal.

In an appeal from a civil case, the grounds upon which the party appeals need not be notified; but in appeals from certain criminal cases the grounds upon which the appeal is founded must be given at the trial, or shortly thereafter, according from what Court the appeal is made. Where no specified time is fixed by law within which an appeal must be noted and prosecuted, it must be within a reasonable time from the date of the judgment, that is, by the first favourable opportunity; and the Court to which the appeal is to be taken is to decide, in its discretion, as to the reasonableness of the time, according to the circumstances causing the delay.

Formerly, as a rule, no prosecutor in a criminal case had a right of appeal unless where this right had been expressly given by any local statute. By the 4th Section of Act 21 of 1876, it is provided that

"no public or private prosecutor shall . . . . be entitled to bring any case, either in appeal or in review, in any superior Court which could not before the passing of this Act be brought under such appeal or review."

The reference in the 5th Section of Act 17 of 1886, that

"it shall be lawful for a *prosecutor* or defendant in any criminal suit which shall be brought in appeal or review before the E. D. Court, High Court of Griqualand West, or any Circuit Court to appeal to the Supreme Court, &c.," . . . .

could refer only to where this right of appeal may have been

[1] See Chapter "*Costs*."

[2] Van der Linden, 3, 1, 5, §§ 1 and 5.

[3] § 27 of said Act, and *Kimberley Waterworks* vs. *Kimberley Town Council*, decided in 1902, not reported.

[4] *Reis* vs. *Executors Galloway*, 1 M., p. 200.

given by statute to the prosecutor.[1] But now by Sect. 31 of Act 35 of 1896 it is enacted that it shall be lawful for the prosecutor or defendant in any criminal suit, which shall be brought in appeal or review before the Court of the Eastern Districts, High Court, or any Circuit Court, *from any inferior* Court, to appeal to the Court of Appeal in Criminal cases against the judgment of the said Court of the Eastern Districts, High Court, or Circuit Court, as the case may be. It will be noticed from the words "*from any inferior Court*," that this applies to a Magistrate's Court and to Courts inferior to that.

No appeal can go to the Privy Council except from a judgment of the Supreme Court; so that any suitor who has instituted his case in any of the lower Courts, wishing to carry it to the highest Court of Appeal, must first have a decision thereon of the Supreme Court.

Executions should, as a rule, be issued out of the Appeal Court giving the final judgment, and not out of the Court appealed from, except in the case of appeal to the Privy Council, in which case the writ for the Privy Council's judgment is to be issued out of the Supreme Court. But a Magistrate's Court judgment heard in appeal in a Higher Court may be executed either by that Court or by the Court appealed to, as the Appeal Court has concurrent jurisdiction in respect of its own order.[2]

b.—From the Court of the Special Justices of the Peace.

A special justice of the peace has no civil, but only criminal, jurisdiction. His jurisdiction is very limited, and is intended only for certain offences of most frequent occurrence committed within the local limits assigned to him by proclamation. The records and proceedings of all cases adjudicated upon by him must be forwarded by him to the Supreme, or E. D. Court, or High Court of Griqualand West, according to the district where he holds his Court, and thereupon the 47th,

[1] See also *Prince Albert Board of Management* vs. *Jooste and others*, 4 J., 400.

[2] *Soeker Brothers* vs. *Hambly*, 3 C. T., 357; and see Chapter "*Writs of Execution*."

48th, and 49th Sections of the Magistrates' Court Act shall be applicable:[1] and an appeal or review, as the case may be, can then be made to such Higher Court upon giving the Attorney-General, or Public Prosecutor of the High Court to which the proceedings are sent, 48 hours' notice before the argument, which notice must contain the grounds or reasons upon which the sentence is sought to be reversed or altered.[2]

c.—From the Consular Courts.

By Act 3 of 1890 provision is made for appeal to the Supreme Court only from any Consular Court to be established in Africa in terms of Her Majesty's Order in Council, known as the "African Order in Council, 1889." The power by this Order in Council shall be "exercised only *within and for the local jurisdiction constituted or to be constituted.* The limits of the said Order shall be the continent of Africa, with the maritime and interior territorial waters thereof, and the islands adjacent thereto, and the Island of Madagascar and its dependencies, and their territorial waters," &c. In pursuance of this Order in Council, appeals are now allowed from Rhodesia to the Supreme Court by our Colonial Act 22 of 1898.

In all civil matters an appeal from the Consular Court shall be direct to the Supreme Court, and from the Supreme Court it may, in all appealable cases, be to the Privy Council. Notice of appeal from a Consular Court in a civil case must be given within two months from the date of the decision. There is no right of appeal from a Consular Court in criminal cases, except when a person has been sentenced to imprisonment exceeding twelve months or to a fine exceeding £100: but if a Secretary of State by any general or particular instructions so directs, the sentence shall be submitted to the prescribed Court of Appeal for review; and the Court of Appeal shall give such instructions as it may think fit to give, either as to the finding of fact or as to law, or as to mitigation of sentence, and the Consular Court shall give effect to such sentence.

[1] Act 10 of 1876, § 4.

[2] § 49 of Act 20 of 1856.

This leave to appeal must be applied for within a month from the delivery of the decision of the Court.

d.—From the Resident Magistrates' Courts.

In *criminal* cases an appeal from a conviction of a Magistrate was formerly allowed only in certain sentences,[1] but this right of appeal has since been extended to every sentence or conviction of a Magistrate, however light the sentence or the fine may be.[2]

The appeal may be made, at the option of the accused, either to the ensuing Circuit Court of the district in which the offence was committed, or to the Eastern Districts' Court, or to the High Court of Griqualand West, within their respective jurisdictions, or to the Supreme Court.

Notice in writing of his intention to appeal to whatever Court he has elected must be given by the accused, or by his agent, to the Clerk of the Court of the convicting Magistrate, within four days after the conviction. A verbal notice of intention to appeal is not sufficient, even though the Magistrate may have made a note on the record of an intimation to appeal. The notice must be given in writing;[3] and this appeal, if to the Circuit Court, must be prosecuted at the ensuing Circuit Court; if to a higher Court, then within 41 days after the notice of appeal, and if not prosecuted within the time mentioned, the sentences become final and operative;[4] and the appeal is not properly prosecuted unless the day for which it is set down for hearing in the Supreme Court is within the 41 days after notice of appeal to the Magistrate's clerk. This does not, however, prevent the Court from extending the time under special circumstances and in the interests of justice.[5] By virtue of this section of the Act the Supreme Court has refused to extend the time of appeal, because the appeal was not noted as required by the Act.[6]

[1] §§ 47, 48, and 49, of Act 20 of 1856.

[2] Act 21 of 1876, § 4.

[3] *Mossel Bay Municipality* vs. *Wiggett*, 2 C. T., 181.

[4] § 4, Act 21 of 1876. See also *Snyders* vs. *Theron*, 3 C. T., 421, and *The Queen* vs. *Desi*, 15 S. C., 29.

[5] *Queen* vs. *Bruyns*, 9 C. T., 389, and *Reg.* vs. *Francis*, 11 C. T., 26.

[6] *Ex parte Geary*, 4 J., 491, and *Regina* vs. *Prince*, 1 C. T., 199; *Brink* vs. *The Attorney-General and others*, 8 C. T., 33; *Regina* vs. *Botha*, 9 C. T., 429.

Notice of the appeal must be given to the Attorney-General or to the Public Prosecutor of the Court to which the appeal is made, 48 hours before the time of hearing, and the grounds and reasons upon which it is sought to review or alter the sentence appealed from should be given in the notice.[1] But where a person has been only reprimanded and not sentenced, though convicted by a Magistrate, he cannot appeal, but should bring the proceedings under review.[2] If a private person prosecutes, due notice of appeal, or review, should be given to him also. Formerly a prosecutor, whether public or private, was not entitled to appeal.[3] But now he may appeal, but only from a Magistrate's Court or a lower one to that.[4]

No security is given on appeal in a criminal case, except where an Act under which a prosecution is instituted should specifically so enact.

Whatever the result of the appeal may be, no costs are allowed either to the prosecutor or the accused,[5] unless special provision has been made for it by the Act under which the accused was charged.

In *Civil* cases every suitor can appeal from a Magistrate's final judgment or decree to any higher Court he pleases, either to the Circuit Court, or Eastern Districts' Court, or High Court of Griqualand West, or to the Supreme Court.[6] By leave of the Privy Council he may even appeal to the Privy Council, after the Supreme Court shall have decided upon the appeal.

The appeal should be *noted by the next Court day* with the Clerk of the Court;[7] but from a Periodical Court it should be noted within 10 days.[8] However, as an act of favour, owing to exceptional circumstances, the Court sometimes extends the time to appeal.[9] But though the time for noting an appeal may have expired, and the Court has refused the leave to appeal, yet this does not prevent the Court from enter-

[1] § 49, Act 20 of 1856; see also *Snyders* vs. *Theron*, *supra*.
[2] *Queen* vs. *Erfurt*, 12 C. T., 427.
[3] § 4, Act 21 of 1876; consult also *Prince Albert Board of Management* vs. *Jooste and others*, 4 J., 400.
[4] Act 35 of 1896, § 31.
[5] § 49, Act 20 of 1856, *Snyders* vs. *Theron*, *supra*.
[6] § 33, Act 20 of 1856.
[7] § 33 of said Act.
[8] § 7 to Schedule B, of Act 9, 1857.
[9] *Smith and another* vs. *Pinto*, B. for 1868, p. 105.

taining an application for review, in cases where any of the grounds for review can be clearly shown.[1]

No leave or permission is required from a Magistrate to appeal from his decision. The mere depositing of the sum of £1 17*s.* 6*d.* with the Clerk of the Court, as security for the costs of conducting the said appeal, with an intimation at the same time to what Court the appeal is to be made, is sufficient. But if the appellant abandon his appeal within 14 days after the noting, he is entitled to get back this deposit; otherwise it will be applied to the payment of the costs incurred by the opposite party, and the surplus, if any, will be forfeited for the benefit of the Crown.[2]

The appellant must, however, prosecute his appeal from the Magistrate's Court, if to the Circuit Court, by the next ensuing Circuit Court for the district of such Magistrate; and if a to higher Court, *within a reasonable time* after the judgment was given, for instance, during the then term of the higher Court, if at all possible, but certainly not later than the first day of the next term.[3] Still the question as to "reasonable time" is within the discretion of the Court, who in one case held that though five months had elapsed between the date of the judgment and the day of hearing the appeal was not so unreasonable as to justify the discharge of the notice of appeal.[4] If the respondent wishes to bar the appeal owing to the appellant's failure to prosecute it within the time named, he should serve the appellant with a notice of motion calling upon him to show cause why he should not be debarred from prosecuting the appeal.[5] But he should not wait till the day of hearing the appeal and then raise his objections orally.[6]

If any suitor wishes to withdraw an appeal he should do so unconditionally and in writing to the Magistrate.[7]

An appeal in a civil case from a Magistrate's Court in

[1] *Ghislin* vs. *Syster*, B. for 1874, p. 57; and *Tabata* vs. *Tabata*, 5 J., 328.

[2] Rules 33 and 35 of Act 20 of 1856.

[3] *Meyer* vs. *Barry*, decided August, 1878, not reported; see also *Rymer* vs. *Solomon*, 9 J., 470, 3 C. T., 350.

[4] *Davids* vs. *Mendelsohn*, 8 C. T., 371.

[5] *Poswa* vs. *McBukwe*, 4 C. T., 419; and *Rowsell* vs. *De Stadler*, 12 S. C., 399.

[6] *Harris* vs. *De Waal*, 12 S. C., 409.

[7] *Cloete's Trustee* vs. *Green*, 12 S. C., 247.

Transkei and Griqualand East Territories formerly was either to the Chief Magistrate thereof, or to the Eastern Districts' or Supreme Courts, as the party might elect,[1] and the same procedure which applied to appeals to the Chief Magistrate applied also to appeals to the Supreme and Eastern Districts' Courts.[2] But now by Act 26 of 1894 no appeal can be made to the Chief Magistrate of those territories, or from the territories mentioned in this latter Act, but can be made only to the Supreme Court or Eastern Districts' Court or to a certain Court held within the territories in any civil suit.[3] But where natives alone are the parties to the suit the appeal can be made only to the Chief Magistrate of the territory, assisted by two assessors appointed by the Governor.[4]

An appeal may be made from a Magistrate's Court judgment for costs only, though not from a higher Court.[5]

No objection to the title of a plaintiff to sue can be taken on appeal which was not taken in the Court below.[6] Nor will the Court reverse the decision of a Magistrate upon a ground of defence which was not set up in the Court below, and which did not arise on the face of the record.[7]

In an appeal affidavits were formerly allowed to show the rejection of material evidence by a Magistrate.[8] But the modern mode of proceeding is to serve a notice of motion, supported by an affidavit, calling on the other party and the Magistrate to shew cause why the record should not be amended.[9]

Pending an appeal to a superior Court, the Magistrate may, in his discretion, direct either that his judgment shall be carried into execution, or that it be stayed, upon proper security being given before him, either by the appellant or by the respondent as the case may be, for restitution, or for the performance of such judgment or order as the Appeal Court may make thereon, according as the judgment is suspended or carried into execution;[10] and even a decree

[1] § 21, Act 40, 1882.
[2] *Biddulph* vs. *Yates*, 9 J., 498.
[3] § 2.
[4] §§ 3 and 4.
[5] See Chapter "*Costs*."
[6] *Gerber* vs. *Richter*, 3 M., 424.
[7] *Maynard* vs. *Adams*, 3 M., 496.
[8] *Jones* vs. *Rhynhout*, 3 M., 463.
[9] *Koch* vs. *Zackon and another*, 12 S. C., 120.
[10] § 33 of Act 20, 1856, and Rules thereto 33, 34.

of civil imprisonment may be granted, upon a return of *nulla bona* pending the appeal.[1]

The Court to which the appeal is made has the power to reverse or alter the judgment of the Magistrate, or to remit the case to him for further evidence or information, either generally or specifically, for the due determination of the case. But the Magistrate cannot decide upon such additional evidence.

The Magistrate from whose judgment an appeal is made must give, in writing, a statement of the facts he may find as proved, and his reasons for his judgment.[2] But the Appeal Court is not bound by any rule of law to accept a Magistrate's decision upon a question of fact.[3]

e.—From the Circuit Courts.
f.—From the High Court of Griqualand West.
g.—From the E. D. Court.

As the process of appeals from these Courts is in each case the same, and to the same Court of Appeal, I shall treat of them together, dealing firstly with criminal and afterwards with civil cases.

Criminal Cases.

Under the heading of the "*Magistrates' Court*" I have instanced how and when appeals could be made from that Court; but until 1879 there was no appeal in this Colony from *criminal cases* in the higher Courts. Why this should have been I cannot account for, as by the law of Holland there was a right of appeal in criminal cases. To get over this anomaly the Supreme Court would formerly entertain a petition for setting aside proceedings on some legal grounds. They did not, however, formally set such proceedings aside, but what they did was to report to the Governor the illegality of the conviction, and recommend him to quash it.[4] The Governor, though not bound to act upon the suggestion

[1] *Hollis* vs. *Chase*, 8 J., 3.
[2] § 7 of Act 43 of 1885.
[3] *Shaw* vs. *Steyn*, 3 C. T., 403.
[4] *Queen* vs. *Mans*, decided in 1867; and *Queen* vs. *Thyaart*, decided in 1871, both for murder, and the accused in each case was condemned to be hanged—neither of which is reported.

of the Supreme Court to quash the proceedings, always did so. This right to report to the Governor for the remission or reduction of a sentence, which cannot be done by the Supreme Court where there is no appeal, has been exercised by that Court also in the cases of *Queen* vs. *Topken and Skelley*,[1] and *Queen* vs. *Dyason*.[2] The former case was to set aside a conviction, and the latter was for the reduction of a sentence which was thought by the Supreme Court to be unnecessarily severe. Other cases may also arise where the Supreme Court may have to exercise similar duties, because, in their opinion, the sentences should be remitted, or partially so, when they have no power to do it. But since 1879 appeals are allowed from the Circuit and the higher Courts *only in the cases provided for*.[3]

Now the cases provided for are those in which a person tried upon any indictment thinks "*that any of the proceedings of the Court are irregular or not according to law.*" In such a case he may, either during the trial or after his conviction, apply to such Court to "*direct that a special entry be made on the record, showing the nature of the proceedings alleged to be irregular or illegal.*"[4] When this entry is made, he may then by leave of the Judge who tried the case appeal against his conviction, on the ground of irregularity or illegality. But he must, in addition thereto, give fourteen days' notice of his appeal to the Registrar of the Court appealed from.[5] Even where this notice had not been given to the Registrar, as required by this section, the Appeal Court has nevertheless given leave to appeal.[6] But no conviction shall be set aside by the Appeal Court by reason of only some irregularity or illegality, or the improper admission or rejection of evidence, whereby the defendant was not prejudiced in his defence, or when the Court of Appeal thinks that no substantial wrong was done to him.[7] Thus, for instance, the Appeal Court refused to disturb a verdict given early on Sunday morning, because it was not shewn that the prisoner had in consequence

[1] 1 A., 471.
[2] Decided in December, 1890, not reported.
[3] § 22 of Act 5 of 1879, now superseded by §§ 29–36 of Act 35 of 1896.
[4] § 32 of Act 35 of 1896.
[5] § 33, Ibid.
[6] *Queen* vs. *Hermann and another*, 1 A., 316.
[7] § 36.

suffered any substantial wrong.[1] So also did they refuse to set aside a conviction on the ground that there had been no proper commitment of the prisoner before trial, because it was not an irregularity or illegality by which it can be said he was thereby prejudiced in his defence.[2] On the other hand, where the prisoners were indicted for murder, but convicted for concealment of birth, and there was no evidence of concealment to go to a jury, the Appeal Court decided this to be an "irregularity," and quashed the verdict.[3]

But, as a rule, the Appeal Court will not, in a criminal case, consider a question not reserved by the Court below; but where a point goes to the root of a case, and the Crown does not object, they will entertain the appeal.[4] So also has the Appeal Court entertained an appeal on the petition of a prisoner convicted before a Circuit Court where no application had been made at the trial for leave to reserve a point for argument before the Supreme Court, the Judge who presided at the Circuit Court consenting to the appeal.[5] So also, where no question at all has been reserved, and the Crown and the prisoners have agreed to ask the opinion of the Appeal Court on a question as to the validity of a conviction, the Appeal Court will hear the arguments, answer the questions submitted, but can give no formal judgment, and can only report to the Governor the expression of their opinion, which is, however, not binding on him.[6] But the Appeal Court will refuse to deal with a question when its decision thereon can have no practical result upon the sentence passed upon a person.[7]

The Judge may, *mero motu*, reserve for the Appeal Court any question of law that may arise on the trial of any person, and order a special entry to be made on the record of the question or point of law reserved.[8] No security for costs is required in the appeal; but when a sentence is suspended the Judge may order the defendant to give bail for his

[1] *Queen* vs. *Hermann and another*, 1 A., 316.
[2] *Queen* vs. *Nkalaya and others*, 1 A., 175.
[3] *Queen* vs. *Elsie and Antje Thomas*, 1 A., 21.
[4] *Queen* vs. *Braham*, 1 A., 147.
[5] *Regina* vs. *Margolins*, 4 C. T., 359, 440.
[6] *Queen* vs. *Topken and Skelley*, 1 A., 471.
[7] *Queen* vs. *Peyper*, Ibid, 374.
[8] § 34, Act 35, 1896: *Queen* vs. *Judelman*, 3 C. T., 13.

appearance whenever required, or, if he be sentenced to any punishment other than simple imprisonment, to be treated as an unconvicted prisoner, pending the appeal. The Judge may, however, in his discretion, order the sentence to be carried into execution, notwithstanding the appeal, except the case of a sentence of death, or of flogging, which must be suspended till the Appeal Court has decided thereon.[1]

The Court of Appeal has the power either to confirm the sentence of the Court below or to set it aside; or if no judgment was given, then either to remit the case for judgment, or to give such judgment as ought to have been given at the trial; and if the defendant is out on bail and he gets convicted, forthwith to commit him to custody to undergo his sentence.[2]

Formerly a point of law in a criminal case reserved by a Circuit Judge, or an appeal from a criminal case in a Circuit Court, might be made to the E. D. Court or High Court of Griqualand West, within their respective jurisdictions, or referred or made to the Appeal Court direct. But now it can only be made to the Court of Appeal in criminal cases.[3] But an appeal under the special Court of the Diamond Trade Act[4] may be made either to the High Court of Griqualand West or to the Supreme Court. If to the former Court, that Court is not bound to allow an appeal, under this Act, to the Supreme Court.[5] Hence the appeals are always direct to the latter Court.

Though a prisoner has pleaded guilty, if he did so in ignorance of the law, the conviction may be quashed;[6] and if a person has served his sentence he may appeal, by leave of the Court, on a point reserved by the presiding Judge, but not brought to the notice of the appeal Court until several years after, and only then because he found his career damaged by the conviction hanging over him.[7]

The Appeal Court will not allow an appeal from a certificate of a Judge, under § 47 of Act 20 of 1856, who had

[1] § 35, Act 35, 1896.
[2] § 36, Ibid.
[3] § 34.
[4] 48, 1882, § 52.
[5] § 51.
[6] *Queen* vs. *Poley*, B. for 1878, p. 49.
[7] *Queen* vs. *Brandford*, 7 J., 169.

certified that the conviction of a Magistrate was in accordance with real and substantial justice.[1]

Civil Cases.

The rule that appeals from these Courts in criminal cases can be had only to the Appeal Court applies also to civil cases. But while either party can appeal only to the Appeal Court, the parties to a civil suit may in a Circuit Court only held for any of the Eastern Districts, or for Griqualand West, or British Bechuanaland, by *mutual consent*, and with permission of the presiding Judge, refer a case to the E. D. Court and High Court of Griqualand West for argument and judgment, and so may the presiding Judge also refer a case to the two latter Courts, but there is no appeal from a Circuit Court to the High Court of Griqualand West and the Eastern Districts' Court, but only from a Magistrate's Court.[2]

Any party to a civil suit, in any Circuit Court, or the High Court of Griqualand West, or the Eastern Districts' Court, may appeal to the Court of Appeal against any judgment decision, or order of such inferior Courts. The notice of appeal may be given the moment judgment is pronounced, but it should not be later than 21 days thereafter. The notice is to be given to the party respondent, and to the Registrar of the Court from which the appeal is made, and must be prosecuted within three months from the day of the judgment, if there shall then be a sitting of the Appeal Court; if not, then at the next sitting of the Appeal Court. But any one of the Judges of the Court of Appeal may, for good and sufficient cause shewn, extend the time of appeal, and so also may the Appeal Court itself.[3] But when no sufficient reason can be shewn why the period within which a party can appeal should be extended, the leave can be refused with costs.[4]

Pending such appeal from any of these Courts to the Appeal

[1] *Re Fine*, 2 A., 113; see also § 38 of Act 35 of 1896.

[2] §§ 24 and 28 of Act 35 of 1896.

[3] §§ 23 and 24 of Act 35 of 1896; *Hiscock* vs. *De Wet*, *Alexander* vs. *Owen*, *Queen* vs. *Topken and Skelley*, 1 A., 35, 86, 473; and *Hulpert* vs. *Castle Mail Packet Co.*, 6 J., 26.

[4] *London and South African Exploration Company* vs. *Cathypadydchy*, 1 C. T., 185; *Van Niekerk* vs. *Brown and Colonial Government*, 11 C. T., 24.

Court, it is in the power of the Judge or Court appealed from to order the judgment to be either stayed or carried into execution, as to the Judge or Court shall appear to be the more consistent with real and substantial justice. If the judgment is suspended, pending an appeal, the appellant must enter into good and sufficient security for the performance of the judgment as the Appeal Court may decide thereon, and if the judgment is ordered to be carried into execution, the party respondent must give good and sufficient security for the due performance of the judgment appealed from. In either case the security must be approved of by the Registrars of the respective Courts; but if the appeal be from a Circuit Court then by the Magistrate of the District. The Appeal Court may, however, in either or both cases, dispense with the security of either party.[1] This Act does not take away from the Appeal Court the power, under the common law, to order security to be given; but the Court will not entertain such an application until the Court appealed from has first been applied to for security and decided thereon, or a good cause shewn why no application was made.[2] So also where no application was made in the Court below for security, because the plaintiff had sued *in formâ pauperis*, he was ordered (as appellant) by the Appeal Court, to give security for the costs of the appeal, because this privilege to sue *in formâ pauperis* is not extended to an appeal.[3]

An appeal from a Judge in chambers must first be made to the Court where the Judge is located before it can be made to a higher Court.[4]

As a general rule, the Appeal Court will not reverse the decision of the Court below on a mere question of fact when there is substantial evidence to support the finding.[5] But the finding must be based on a question of fact, and not merely on impressions drawn from certain other facts.[6] In

[1] § 26 of Act 35 of 1896.

[2] *Langford* vs. *Marais*, decided Appeal Court, 1891.

[3] *Hulpert* vs. *The Castle Mail Packet Co.*, 6 J., 26, and *re Du Plooy*, 13 C. T., 11, and 10 J., 7.

[4] *Perrins' Trustee* vs. *Bombael*, B. for 1877, p. 50.

[5] *Leo and others* vs. *Ramsbotham*, and *Murtha* vs. *Allen and Laing*, 1 A., 40 and 139.

[6] *Hoole's Trustees* vs. *Hudson & Co.*, Ibid, 142.

an appeal from a Magistrate's Court[1] the Chief Justice said:—

"I am not prepared to lay down as a general principle that under no circumstances should the Court reverse the decision of a Magistrate upon a pure question of fact. The preponderance of evidence may be so great and there may be such cogent circumstances showing that the credibility was all on one side, as to justify the Court in reversing the Magistrate's judgment upon a direct issue of fact, but *this should not be done if the Court of Appeal entertains any doubt on the matter;*"

and in the case of *Shaw* vs. *Steyn*,[2] the Chief Justice said:—

"It is a most unusual course for this Court to reverse the decision of any Magistrate upon a question of fact, but there is no rule of law which binds this Court to accept the decision of a Magistrate upon a question of fact."

No appeal will be allowed on a question of costs only.[3] But where a defendant succeeded on appeal in obtaining a substantial reduction of the amount of damages given against him in the Court below, he was held entitled to costs of appeal, though remaining liable for the costs in the Court below; but where he only to some extent succeeded in his appeal, each party in the appeal had to pay his own costs. So also where an appellant succeeded on a point not raised in the Court below, the Court of Appeal allowed the appeal, but without the costs thereof.[4]

Formerly the Appeal Court might remit, if necessary, to the Court which tried the case any civil case, for the purpose of taking further evidence, or to take such other proceedings as might be directed.[5] But these two Acts have been repealed by Act 35 of 1896, and no provision made therein for remission of a case for further evidence. This does not affect the remission of cases to the *Magistrate's* Courts from further evidence.

No provision is made compelling the Judges to give their reasons for their judgments in appeal from any Circuit Court,

[1] *Van Reenen* vs. *Manuel*, 9 J., 249.
[2] 3 C. T., 403.
[3] § 27 of Act 35 of 1896.
[4] *Murtha* vs. *Van Beek*, *Kimberley Mining Board* vs. *Stanford*, *G. W. Diamond Mining Co.* vs. *L. & S. A. Exploration Co.*, 1 A., 121, 129, and 239.
[5] § 28, Act 21 of 1864; § 3, Act 12 of 1880.

or from the High Court of Griqualand West, or from the Eastern Districts' Court, though these are always given as a matter of courtesy; but when an appeal goes to the Privy Council the Judges of the Supreme Court must give their reasons in writing.

The records for an Appeal Court must be printed, and ten days' notice of the argument should be given to the Registrar.

There is nothing to prevent a Judge sitting on appeal from his own judgment.

h.—From the Supreme Court to the Privy Council.

Appeals from the British Colonies can be only to the Privy Council direct, and to no other tribunal; though appeals in Great Britain and Ireland can go first to the Special Court of Appeal and afterwards to the House of Lords. It is a singular fact that though Courts of Law can vary or overrule their previous decisions, the House of Lords is bound by its previous decisions given upon a point of law, and it cannot even allow a question to be raised or re-argued in any subsequent case, and its decision can only be set aside by an Act of Parliament.[1]

No appeals from the Colonies can go to the House of Lords.

No appeal from this Colony can go to the Privy Council except an appeal from the Supreme, or Appeal, Court here.

The Supreme Court is now also the Colonial Court of Appeal.

In order to appeal from the Supreme Court to the Privy Council from any *final* judgment, the amount in dispute, or the matter at issue, should be above the value of £500; or the judgment should involve a question of property of the value of at least £500; or, if the case be one of civil right, it should amount to the value of £500.[2]

No appeal can be made to the Privy Council on an *Interlocutory* order.[3]

[1] *London Tramway Co.* vs. *London County Council*, 78 L. T., 361.

[2] § 50, Charter of Justice.

[3] *Kimberley Town Council* vs. *Kimberley Waterworks*, decided 1902, not reported.

For the purpose of deciding whether there is a right of appeal, the sum or matter at issue must be ascertained by reference to the pleadings, and not from the circumstances of the case as disclosed at the trial, and the point to be ascertained is whether the matter at issue is above the amount or value of £500. In the case of *Smith* vs. *Davis*[1] De Villiers, C.J., said, *inter alia* :—

"For myself I am inclined to give a liberal construction to provisions "giving the right of appeal; but, according to its ordinary construction, "the section is fully capable of bearing the interpretation contended for "by the defendant. The words of the section give an appeal in case any "judgment, decree, order or sentence shall be given or pronounced for, "or in respect of, any sum or matter at issue above the amount or value "of £500."

In this case the amount at issue was far above £500. The plaintiff alleged that he had suffered damages to the extent of £1,500, and prayed judgment for half that amount. True, the judgment given was for less than £500; but it was a judgment in respect of a much larger sum at issue. The inclination of the Court has always been to favour the right of parties to appeal to His Majesty in Council.

Thus, where a person sued for £500 damages for breach of contract and was awarded only £100, the Court held that, though the amount demanded, and not the amount obtained, is the test as to the £500 value, yet that, in order to entitle the appellant to appeal, he must come within the 50th section of the Charter of Justice, and that the amount at issue in this case was really not £500.[2]

On the other hand, an appeal to the Privy Council has been allowed in an action for £25 damages, a perpetual interdict, and a declaration of rights, the rights in question being of the value of £500:[3] an appeal has been allowed also where the question of right involved, amounting to over £500 in value, was not denied.[4]

In estimating the principal amount the interest may be included;[5] but the amount of the costs cannot be taken into

[1] B. for 1878, p. 80.
[2] *Roebuck* vs. *Murdoch*, 1 J., 41.
[3] *De Villiers* vs. *The Cape Divisional Council*, B. for 1875, p. 125.
[4] *Reiners, Von Laer & Co.* vs. *Fehr*, 2 C. T., 147.
[5] *Laforet* vs. *Nourse*, 1 M., 497.

consideration in estimating the appealable amount.[1] So, also, claims in convention and in reconvention, and the judgment given thereon, must be held as distinct and separate claims and judgment, and the amount decided on one of the claims cannot be taken into computation with the amount decided on the other claim in order to enable a defendant to appeal on both judgments. So, also, only the amount of the balance sued for, and not the original amount of the debt, can be taken into computation in fixing the appealable amount;[2] and an appeal will be refused until after definite accounting has taken place between the parties.[3]

The party wishing to appeal must, within 14 days after the final judgment, lodge with the Registrar of the Supreme Court a petition for leave to appeal to the Privy Council, and give notice thereof to his opponent,[4] and he must also within the same period apply, on the petition, to the Supreme Court for leave to appeal from the said judgment.[5] But in the case of *Jones* vs. *Town Council of Cape Town*,[6] the Chief Justice said that though the 50th section of the Charter of Justice is somewhat obscure the provisions relating to appeals ought to be liberally construed in favour of an appellant, and granted leave to appeal where though the usual petition for leave to appeal was lodged and notice thereof given to the other side yet no application had been made to the Court within the 14 days.[7] But where no petition has been lodged within the 14 days the Court refused leave to appeal.[8]

When leave to appeal has been obtained, the appellant must within three months thereafter enter into recognisance with the respondent, together with two other persons as sureties, to be approved of by a Judge, for the due prosecution of the appeal and for the costs as may be awarded thereon.[9] The Rule of Court requiring recognisances to prosecute an appeal to the Privy Council to be entered into within three months is imperative, and when no such recognisance is

[1] *Norden* vs. *Opperheim*, 3 M., 409.
[2] *Marthyse* vs. *Van Reenen*, 3 M., 457.
[3] *Still* vs. *Norton*, 2 M., 211.
[4] Rule of Court 37.
[5] § 50, Charter of Justice.
[6] 5 C. T., 172.
[7] Ibid, 12 S. C., 144.
[8] *Cape of Good Hope Building Society* vs. *The Bank of Africa*, 11 C. T., 18.
[9] Rules of Court 38, 40, and § 50 of the Charter of Justice.

entered into, the leave to appeal will be recalled.[1] So also where the required security had not been given within three months from the time when leave to appeal was granted, the order for leave to appeal was discharged;[2] and again where the petition for leave to appeal was lodged, but appellant had not entered into recognisances to prosecute the appeal within three months, the appeal was disallowed.[3] The security bond must be in the usual form adopted in practice.[4] An appeal allowed by the Supreme Court and the recognisance approved of cannot be discharged by the Supreme Court, but application should be made for that purpose to the Privy Council.[5]

But, of course, though the Supreme or Appeal Court should refuse to allow an appeal, or discharge an appeal not duly prosecuted within the time prescribed, the Privy Council has retained to itself, and frequently exercises, the power of granting an appeal where the lower Court would or could not do it.[6] Also a respondent's objection, before the Privy Council, as to the competency of the appeal, on the ground that the subject-matter of the suit does not involve the prescribed appealable value, should be made, not during the hearing of the appeal, but previously, by motion, for a discharge of the appeal.[7]

But, pending the appeal to the Privy Council, no writ of execution can be issued without the leave of the Supreme Court, and the Court may, on granting leave to appeal, order also that, pending such appeal, the judgment shall either be carried into execution, or that the execution thereof shall be suspended, as the Court shall in either case consider to be more consistent with real and substantial justice; and thereupon the party, whether appellant or respondent, according to the circumstances of the case, must enter into good and sufficient security, to be approved of by the Supreme Court, or a Judge, for the due performance of such judgment as the

[1] *Paterson* vs. *Umsinto Sugar Company*, B. for 1879, p. 90.

[2] *Montmort* vs. *Board of Executors*, 4 J., 61, and *Heydenrych* vs. *Kingon*, 7 J., 144.

[3] *Forbes & Co.* vs. *Sutherland*, 2 S., 275.

[4] *Reiners, Von Laer & Co.* vs. *Fehr*, 9 J., 266.

[5] *Colonial Government* vs. *Cook Brothers*, 7 C. T., 2.

[6] § 51, Charter of Justice; *in re Colenso, Bishop of Natal*, 3 P.C. (N.S.), 115; and McPherson's Practice of the Privy Council, pp. 19–52.

[7] *Aldridge* vs. *Cato*, 9 Privy Council Reports (N.S.), 70.

Privy Council shall think fit to deliver thereon.[1] So also was a judgment of the High Court of Matabeleland ordered to be carried into execution though an appeal was by our Supreme Court allowed to the Privy Council. The writ of execution to be issued out of said High Court, and the respondents to give security *de restituendo* to the satisfaction of the said High Court.[2] But where a writ of execution had been issued, without leave of the Court, between the date of the judgment and the filing of the petition for leave to appeal, the writ was set aside with costs.[3]

Instead of the whole, the Court may order a part of the judgment to be carried into execution; for instance, the judgment for costs was ordered to be carried into execution, on the respondent giving security *de restituendo*, if the Privy Council should alter the judgment.[4]

No appeal can be had from the finding of a jury in a civil trial, but in case of a misdirection of the Judge, or if the verdict is against the weight of evidence given, then a fresh trial may be had.[5]

But when once the Court has given judgment on the finding of the jury, an appeal may be had to the Privy Council on a *point of law only*.[6]

As a rule, no appeal can be had in a *criminal* case from a Colony to the Privy Council, nor has the Supreme Court here the power to grant such leave to appeal; but on application to the Privy Council such appeals have been allowed for very weighty and special reasons. For instance, in the case of the *Queen* vs. *Bertrand* (tried in 1867), which was an appeal from New South Wales, the Privy Council allowed the appeal, because there were circumstances which raised questions of great and general importance in the administration of justice, where it would be proper for the Judicial Committee of the Privy Council to advise the allowance of such an appeal . . . with a view not only to ensure, as far as may be, the due

[1] § 50 of the Charter of Justice, and Rules 39 and 40; and *Brunette and others* vs. *Stanford*, 3 S., 221.

[2] *The Torva Syndicate* vs. *Kelly and others*, 8 C. T., 214.

[3] *Benning* vs. *Thomas*, B. for 1878, p. 47.

[4] *Thwaits* vs. *Executors Anderson*, 3 S., 200.

[5] §§ 36 and 37 of Act 23 of 1891.

[6] § 43.

administration of justice in an individual case, but also to preserve generally the due course of procedure.[1]

So also in the case of *Dinizulu* vs. *The Attorney-General of Zululand*, the Privy Council decided (July 30, 1889) that leave to appeal will be given only in a cause where there has been a *departure from the principles of natural justice*, but not on the ground of a violation of a technical rule of procedure or for an error in the form of an indictment or information.[2]

So also in the case of *Carew* vs. *Crown Prosecutor in Japan*,[3] the Privy Council said :—

"Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done."

So also in the case of the *Queen* vs. *Sigcau*, the Supreme Court refused leave to appeal because it was a criminal matter and not a civil suit, and thus not within the terms of Sect. 50 of the Charter.[4] A few months thereafter the Privy Council gave leave to appeal.

As soon as security has been duly given for the prosecution of a civil appeal, a transcript of the record must be sent by the Registrar of the Supreme Court to the Registrar of the Privy Council, together with the reasons (in original) given by the Judges for or against such judgment. The record may be printed either here or in England ; and effectual steps must immediately therefore be taken by the attorneys for the appellant to set down the appeal for hearing within a period not exceeding twelve months from the date of the arrival in England of the copy record.[5]

The Judicial Committee of the Privy Council never give a formal judgment in any appeal cases. They merely report their reasons to, and advise, His Majesty as to what the judgment should be. The formal order is drawn up and signed by His Majesty in Council. The Crown has retained the prerogative right of making any order, in any appeal case,

[1] 4 Privy Council Reports (N.S.), 461.
[2] 61 *Law Times*, 740.
[3] 77 L. T., 1.
[4] 12 S. C., 283.
[5] § 51, Charter of Justice, and Privy Council Rules, in Tennant's Rules of Court, Ed. 3, pp. 223–231.

as may seem just and reasonable, and may remit to the Court appealed from the whole, or any part, of a case for further evidence, or information, or trial; and may also empower the Court below to decide upon such additional evidence.[1]

Consequent upon any final judgment of the Privy Council, on an appeal from this Colony, execution must be sued out of the Supreme Court in like manner as an ordinary judgment of that Court.[2]

Application to Privy Council for leave to appeal, where Supreme Court has refused or cannot grant leave, should be by petition.

Notice setting down case for appeal.

(Heading.)

Sir,—Take notice that this cause in appeal from the decision of the Circuit Court (or E.D. Court, or Griqualand West High Court, or a Magistrate's Court) of .... has this day been set down with the Registrar of this Honourable Court for argument for .... the .... day of ....

Cape Town ....

Yours, etc.

.....

Appellant's Attorneys.

To E.F.

Respondent's Attorney.

Notice for the discharge of an appeal from a Magistrate's Court, not prosecuted within a reasonable time.

(Heading.)

Sir,—Take notice that application will be made to this Honourable Court on .... the .... day of .... at 10 o'clock in the forenoon, on behalf of the above respondent, at which time you will be required to shew cause, if any, why the notice of appeal, given by you, on the .... day of .... to the clerk of the Magistrate, who decided this case, shall not be discharged by reason of your failure to prosecute, and bring to final termination the said appeal within a reasonable time.

And to shew cause why you shall not be ordered to pay the costs of this application.

Cape Town .... day of ....

Yours, etc.

.....

Respondent's Attorney.

To E.F.

the above appellant.

[1] McPherson's Practice of the Privy Council, pp. 124, 125; and *Hiddingh* vs. *De Villiers and others*, 5 J., 298.

[2] § 52, Charter of Justice.

Affidavit in support.

A.B. of . . . . the plaintiff and respondent in the above cause, make oath and say :—

1. That the defendant on the . . . . day of . . . . deposited with the clerk of the Resident Magistrate of . . . . the sum of £1 17*s.* 6*d.*, in consequence of his intimation to said clerk that he has appealed from the decision of the said Magistrate given in the said cause on the . . . . day of . . . .

2. That there has been ample time for defendant to have prosecuted his said appeal, if he so desired, during the last Supreme Court term, but he has failed to do so.

Sworn at . . . .

etc.

Petition for leave to appeal to the Privy Council to be lodged with the Registrar of the Court, and afterwards to move on it for appeal.

(Heading.)

The petition of A.B., of . . . .

Humbly sheweth :—

1. That your petitioner was defendant in the above cause, and feels aggrieved at the judgment given by this Honourable Court on the . . . . day of . . . .

2. That your petitioner is desirous of appealing from the said judgment to His Majesty in His Privy Council.

Wherefore your petitioner humbly prays that your Lordships may be pleased to allow him to appeal from the said judgment to His Majesty in His Privy Council.

And your petitioner as in duty bound will ever pray.

A.B.

(*Affidavit of Verification.*)

Petition to the Privy Council, where the Supreme Court either has refused, or cannot grant, leave to appeal.

In the Privy Council.

In appeal from the Cape of Good Hope.

To the King's Most Excellent Majesty in Council.

The humble petition of A.B. of . . . . sheweth :—

1. That on the . . . . day of . . . . your petitioner instituted an action in the Honourable the Supreme Court of this Colony against C.D. of . . . . (*here briefly state cause of action, as for instance*) to recover damages for unlawfully deviating the water of a certain river, and for a perpetual interdict restraining him from doing so in future, as will be more fully seen from a certified copy of the pleadings hereunto annexed.

2. That on the . . . . day of . . . . the cause came on for hearing, and was after several days' trial, concluded, and on the . . . . day of . . . .

judgment was given against your petitioner, as will be seen from certified copy judgment also hereunto annexed.

3. That your petitioner feeling aggrieved at the said judgment, duly lodged his petition for leave to appeal from it to your Majesty in Council; and on the . . . . day of . . . . your petitioner, through his counsel, formally applied to the said Supreme Court, for leave to appeal as aforesaid, but his application was refused, as per copy order hereunto annexed, on the ground (*here state the reasons: or that petitioner had failed to prosecute his appeal in time, etc.*) that the subject-matter in dispute is not of the value of £500.

Wherefore your petitioner humbly prays that your Most Excellent Majesty in Council will be graciously pleased to order that your petitioner shall have special leave to appeal from the said judgment: and that the said Supreme Court may be requested to transmit forthwith the transcript of the proceedings and evidence in the suit to the Privy Council Office: or that your Majesty may be graciously pleased to make such further or other order as to your Majesty in Council may appear just and proper.

And your petitioner as in duty bound will ever pray.

A.B.

Notice for the discharge of an order granting leave to appeal where the appellant has failed to prosecute his appeal within the time fixed by law.

(Heading.)

Sir,—Take notice that the Honourable the Supreme Court will be moved, on . . . . the . . . . day of . . . . at 10 o'clock in the forenoon, on behalf of the above respondent, at which time you will be required to shew cause, if any, why the leave obtained by you on the . . . . day of . . . . to appeal from the decision of this Honourable Court, given on the . . . . day of . . . . last, to His Majesty in His Privy Council, shall not be discharged by reason of your failure to prosecute your said appeal within the time fixed by law. And why you shall not be ordered to pay the costs of this application.

Cape Town, this . . . . day of . . . .

Yours, &c.

. . . . . .

Respondent's Attorneys.

To E.F.

Appellant's Attorney.

Affidavit in support.

I, A.B., of . . . . attorney for above respondent, make oath and say:—

1. That on the . . . . day of . . . . the above appellant obtained leave from this Honourable Court to appeal to His Majesty in His Privy Council from the decision given by this Honourable Court in the above cause on the . . . . day of . . . . last.

2. That though the appellant has had ample time, he has not even

given the recognisance required in order to enable him to complete the preliminary requisites to an appeal.

3. That the time to give this recognisance has now lapsed, and the appellant is no longer entitled to prosecute his appeal by virtue of the leave given him.

Sworn at . . . .

etc.

Notice for leave to issue execution notwithstanding an appeal to the Privy Council.

(Heading.)

Sir,—Take notice that application will be made to this Honourable Court, on . . . . the . . . . day of . . . . at 10 o'clock in the forenoon, on behalf of the above defendant, at which time you will be required to shew cause, if any, why, notwithstanding the leave to appeal obtained by you on the . . . . day of . . . . in this case to His Majesty in His Privy Council, a writ of execution shall not be issued in satisfaction of the judgment of the Supreme Court pronounced in this cause on the . . . . day of . . . .

And to shew cause also why you shall not be ordered to pay the costs of this application.

Cape Town this . . . . day of . . . .

Yours, etc.

. . . . . .

Defendant and respondent's Attorneys.

To E.F.

Plaintiff and appellant's Attorneys.

Affidavit in support.

I, A.B., of . . . . attorney for the above defendant and respondent, make oath and say :—

1. That on the . . . . day of . . . . this Honourable Court gave judgment in favour of the defendant with costs.

2. That on the . . . . day of . . . . the plaintiff obtained leave from this Honourable Court to appeal from the said judgment to His Majesty in His Privy Council.

3. That the costs of the defendant, now respondent, have been taxed at £ . . . ., and the plaintiff, now appellant, has been applied to, to pay the same, and a guarantee has also been offered to him, to refund them, if the Privy Council should reverse this part of the judgment, but the said appellant has declined to pay them.

4. That, of the two, there will be a greater hardship on the respondent than on the appellant if he were to pay the costs now, and wait for the result of this appeal. (*Instead of this clause, here insert any reason satisfactory to induce the Court to grant the application.*)

Sworn at, etc.

Recognisance or security bond on leave to appeal to Privy Council being granted.

In the Supreme Court
of the Colony of the
Cape of Good Hope.

Between A.B., plaintiff,
and C.D., in his capacity as exor. test. estate
late M.N., defendant.

In appeal from a judgment of the Supreme Court bearing date the . . . . day of . . . . one thousand nine hundred . . . . on the . . . . day of . . . . E.F., one of the attorneys for the above-named defendant now appellant, G.H. merchant, and J.K. attorney, all of Cape Town, appeared before Sir J. H. de Villiers, Knight, Chief Justice of the Supreme Court of the Cape of Good Hope, and the said E.F. acknowledged his principal the said C.D., and the said G.H. and J.K. acknowledged themselves as well, jointly and severally to owe the above-named plaintiff, now respondent in appeal, the sum of £500 sterling of lawful money to be paid to the said respondents, if the defendant now appellant shall make default in the condition under written.

Whereas an action is now pending in the said Supreme Court between the above-named plaintiff and the defendant exor. test. of the late M.N.

And whereas the said action came on to be tried in the said Court for ejectment and damages, on the . . . . day of . . . . when judgment was given, for the plaintiff, setting aside the will of the said late M.N. for want of due execution, with costs, against which judgment the said defendant lodged a petition, to appeal therefrom to His Majesty in His Privy Council.

And whereas the Honourable the Supreme Court, on the . . . . day of . . . . allowed the said appeal to be prosecuted, in terms of the Royal Charter of Justice, upon due security being given.

Now, therefore, the condition of this recognisance is such, that if the said appellant shall duly prosecute the said appeal from the judgment of the said Supreme Court, and if the said appellant shall obey, perform and satisfy such judgment decree or order, as may hereafter be given or pronounced by His Most Gracious Majesty the King, his heirs or successors, in his or their Privy Council, or thereafter by the said Supreme Court, and shall pay all such costs as may be awarded thereon to be paid to the respondent, then this recognisance to be void: otherwise to be and remain in full force and effect.

E.F.
qq.
G.H.
J.K.

Before me,
J. H. de Villiers,
C.J.

Notice to the Attorney-General of an appeal in a criminal case from a Magistrate's Court.

(Heading.)

Sir,—Be pleased to take notice that A.S., who was convicted before the Court of the Resident Magistrate of . . . . on the . . . . day of . . . . of the crime of (theft) and sentenced to (six) days' imprisonment, intends to appeal to the Honourable the Supreme Court against such conviction, on the ground that it is not supported by the evidence given before the said Court, and is contrary to law; and that such appeal has been set down for hearing upon the . . . . day of . . . .

Cape Town . . . . day of . . . .

Yours, etc.

. . . . . .

Attorneys for A.S.

To the Hon.
E.F.
His Majesty's Attorney-General.

(NOTE.—*The notice to the clerk of the Court of R.M. need not contain the grounds of appeal.*)

CHAPTER XXXII.

REVIEW.

UNDER this heading, though sometimes called *review*, are not included certain sentences of the Magistrates which, under the 47th Section of Act 20 of 1856, and Section 2 of Act 10 of 1865, must be remitted to a Judge for his consideration and certificate as to the real and substantial justice of the proceedings. The term, in the sense here intended, applies only to certain proceedings of the lower Courts, for which otherwise no right of appeal is given. For instance, by the 4th Section of Ord. No. 40 of 1828, full power, jurisdiction and authority are given to the Supreme Court to review the proceedings of all inferior Courts of Justice within the Colony, and if necessary to set aside or correct the same.

This language of the Ordinance is repeated in the 32nd Section of the Charter of Justice, which was granted several years thereafter. But the preamble of the Charter extends this power to the several "territories and settlements dependent thereupon" (that is upon the Colony), and the Supreme Court has frequently entertained and decided upon reviews from several of the *dependencies* of the Colony.[1] But it cannot review a cause tried beyond the Colony for an offence committed out of the Colony.[2] Again, both the Ordinance and the Charter of Justice contemplate the review to be only by the Supreme Court, but this right can be exercised now also by the E. D. Court, the High Court of Griqualand West, and the several Circuit Courts, provided it be within their respective jurisdictions.[3] But the Supreme Court only has the right

[1] *Devitt* vs. *The High Sheriff*, 1 J., 412.

[2] *Queen* vs. *Ellingwood*, B. for 1879, p. 212.

[3] Rule of Court 190; and *Queen* vs. *Williams and Holliday*, 1 A., 277.

to hear reviews from the *dependencies*, and, of course, can entertain reviews direct from all parts of the Colony; and so also the Supreme Court alone has the power to review certain criminal cases from the Consular Courts in Africa to be established by virtue of Her Majesty's Order in Council, called the African Order in Council, 1889.

If any question should arise on review of judgment of any inferior Court in a criminal action before the E. D. Court or High Court of Griqualand, such reviewing Court may reserve the question for the decision of the Court of Appeal.[1]

By the 5th Section of the said Ordinance No. 40 of 1828, the grounds of review are given as follows:

(*a*) Incompetency of the Court in respect of the cause, including all excess of jurisdiction, &c.

(*b*) Incompetency of the Court in respect of the Judge, or his near kinsman, having an interest in the cause.

(*c*) Malice or corruption on the part of the Judge.

(*d*) Gross irregularity in the proceedings.

(*e*) The admission of illegal or incompetent evidence, and

(*f*) The rejection of legal and competent evidence.[2]

As to what amounts to gross irregularity in the proceedings is a fact for the higher Court to decide: for instance, to entertain, or not, exceptions pleaded to the right to sue or not is not a gross irregularity;[3] but for a Chief Magistrate to hear and allow an appeal from a resident Magistrate in the absence of both parties to the suit is a gross irregularity in the proceedings.[4] So also the refusal by a Chief Magistrate to hear an appeal, and yet without hearing reversed the decision of the lower Court on the ground that the latter had no jurisdiction, is an irregularity;[5] and so also where a Magistrate, who was shown to be a material and necessary witness for one of the parties to a suit, refuses to allow his clerk to issue a subpœna for him and afterwards tries the case, his conviction was set aside on the ground of irregularity.[6]

In order to get the proceedings of an inferior Court reviewed, proceedings should be taken, *not by notice of*

[1] § 16 Act 40 of 1882.
[2] § 3 of Ord. No. 73 of 1830.
[3] *Godden* vs. *Pienaar*, 3 C. T., 120.
[4] *Pepa* vs. *The Chief Magistrate of Tembuland, and Kwayi*, Ibid, 146.
[5] *Clegg* vs. *Greene and others*, 4 C. T., 361.
[6] *Mens* vs. *Magistrate of Herschel*, 7 C. T., 53, and 14 S. C., 41.

motion, but by summons, and the *grounds of review* should be given in the summons, and should not merely state that the judgment was erroneous and contrary to law, unless it appears on the record that only one question of law had been raised in the cause, and what that one question was.[1] Besides the opposite party in the summons, the Magistrate, or the party in whose custody the records or proceedings in the Court may be, should also be called upon in the same summons to "return and certify to the Supreme Court" (or whatever Court the summons is issued out of for the review) "a copy of such record and proceedings" on the return day named on the summons.[2]

In forwarding the record to the higher Court, the Magistrate from whose judgment the review is sought should at the same time transmit "a statement of the facts which he shall find to have been proved, and his reasons for the judgment pronounced."[3]

Formerly the practice was to petition the Court for leave to issue summons for review, but now application may be made to the Registrar, who, if he is satisfied that the 190th Rule of Court has been complied with, may issue the summons without any application to the Court.[4]

The 190th Rule of Court is not intended to alter the existing law, but to provide machinery for enforcing the law, its object being to indicate the procedure which should be followed by parties wishing to invoke the power of review legally vested in the Court.[5]

If any question of law should arise upon review of a judgment of an inferior Court, in a criminal case, the reviewing Court may reserve the question for the Appeal Court.[6] There is no specified time fixed within which a case should be brought under review, but it must necessarily be within a reasonable time; and though there may be an instance where there is no right of appeal, or the time for an appeal has lapsed, the Court can still review a case, if any of the

[1] *Granet* vs. *Jansen*, and *Stephen* vs. *Anderson*, 3 M., 458 and 511.

[2] Rule of Court 190; *Ex parte Wood*, 1 J., 388; and the *Queen* vs. *Nathanson*, 5 J., 109.

[3] § 7 of Act 43 of 1885.

[4] *Queen* vs. *Nathanson*, 5 J., 109.

[5] *Prince Albert Board of Management* vs. *Jooste and others*, 4 J., 400.

[6] § 16 Act 40 of 1882.

grounds for review mentioned in the said Ordinances can be given.[1]

There is no appeal from the finding of a Licensing Court, but there is a review. When the doctrine of review as treated of in this chapter was first introduced there were few grounds of appeal, but now that appeal may be had in every case from the lowest Courts, especially in the Magistrate's Courts both Civil and Criminal; there should always be an appeal where an appeal is allowable, and review should be resorted to only when there is no appeal, and the point is one for review.[2]

The Court has power to review the proceedings of a Magistrate in cases in which gross injustice has been done, as, for instance, by inflicting too heavy a fine; but a clear case should be made out, and notice should be given to the Magistrate of the application.[3]

Though no appeal can be had to the Appeal Court from a certificate of a Judge under § 47 of Act 20 of 1856, and § 2 of Act 10 of 1865, yet the Court may have power to review under § 32 of the Charter of Justice.[4]

The Court will not entertain an application for review in a criminal case where the judgment was one of "not guilty," although the Magistrate may have erred,[5] nor where the verdict was "not guilty" on a mere issue of fact.[6] But it will entertain such an application where a Magistrate has convicted for an offence but only reprimanded and not sentenced the accused; hence there was no appeal because a Magistrate should pass some sentence beyond a mere reprimand to entitle a person to appeal, and a conviction without a sentence entitles the accused to have the proceedings corrected or set aside upon any of the grounds of review.[7]

A prosecutor cannot bring a Magistrate's judgment upon the merits of a criminal case under review[8] except upon grounds which would justify the quashing of all the pro-

[1] *Ghislin* vs. *Syster*, B. for 1874, p. 57; and *Tabata* vs. *Tabata*, 5 J., 328.

[2] For these principles generally consult *Riddelsdell* vs. *Hall*, 2 J., 356; *Van Rhyn & Co.* vs. *The Licensing Court of Cape Town and another*, 7 J., 295; *Tabata* vs. *Tabata*, 5 J., 328.

[3] *Re Hess*, B. for 1874, p. 2.

[4] *Re Fine*, 2 A., 113.

[5] *Distin* vs. *Williamson*, 1 E.D.C., 20.

[6] *Re Scholtz*, 3 E.D.C., 169.

[7] *Queen* vs. *Erfurt*, 12 S. C., 427.

[8] § 4 Act 21 of 1876.

ceedings and the restoration of the parties to the position in which they were before the issue of the summons.[1]

Summons to review the sentence of an inferior Court in a criminal case where the Crown prosecutes.

(Heading.)

Command A.B. of . . . . in his capacity as Resident Magistrate of . . . ., in the Transkei Territory, and C.D. of . . . ., in his capacity as Chief Magistrate of the Transkei Territory, that justly, and without delay, they or one or other of them appear before our Justices of the Supreme Court at Cape Town on . . . . the . . . . day of . . . . next at 10 o'clock in the forenoon, when an application will be made on behalf of E.F. of . . . . in terms of this summons and one or other of them will be required to produce, return, and certify to the said Supreme Court a true copy of the summons, records and all proceedings in the case of the *Queen* versus the said *E.F.* charged before the said Resident Magistrate of . . . ., on the . . . . day of . . . . with contravening sections 67 and 68 of Proclamation No. 110 of 1879, bearing date the . . . . day of . . . ., and was reviewed by the said Chief Magistrate on the . . . . day of . . . .

And further command G.H. of Cape Town, in his capacity as Her Majesty's Attorney-General of the Colony of the Cape of Good Hope, that he also appears before our said Supreme Court at the same time and hour aforesaid, and at which time an application will be made on behalf of the said E.F. in terms of the summons: and he the Attorney-General is to shew cause why the judgment and proceedings in the said case of the *Queen* vs. *E.F.* charged with contravening sections 67 and 68 of Proclamation No. 110 of 1879, bearing date the said 15th September, 1879, which was tried before the Resident Magistrate of Butterworth on the . . . .day of . . . . and was reviewed by the said Chief Magistrate of the Transkei Territory on the . . . . day of . . . . shall not be reviewed, set aside, or corrected, upon the following grounds:—

1st. That the Court of the Resident Magistrate of Butterworth had no jurisdiction in the said case, inasmuch as it was not a legally constituted Court, not being one of the three Courts mentioned in the first section of the said Proclamation No. 110 of 1879, and not having been since proclaimed.

2nd. That the before-mentioned Court has no jurisdiction in the said matters, inasmuch as the offence, if any, was committed at King William's Town, and the prisoner ought therefore to have been tried at King William's Town.

3rd. That no summons or indictment was served upon the prisoner as required by law.

4th. That there was no evidence, or not sufficient evidence, against the prisoner to justify the Magistrate in convicting him.

[1] *Prince Albert Board of Management* v. *Jooste and others*, 4 J., 400.

5th. That the proceedings before the Resident Magistrate at Butterworth were otherwise wholly irregular and contrary to law.

As it is said : and serve on the said A.B., C.D. and G.H. each a copy of this summons and return, etc.

Witness, etc.

Summons to review the proceedings of a Licensing Court.

(Heading.)

Command, etc., W.C.S., the Resident Magistrate for . . . ., the Chairman, and F.P.W. and the members of the Licensing Court for . . . . all of . . . . District, hereinafter called the defendants, that they appear before our Justices of our Supreme Court of our said Colony, at Cape Town, on . . . . the. . . .day of . . . . next, at 10 o'clock in the forenoon, or so soon thereafter as counsel can be heard, to answer,

H . . . . and B . . . . trading together as H. B. and Company at . . . . in . . . . hereinafter called the plaintiffs, and to shew cause why the proceedings of the Licensing Court for . . . . holden at . . . . on the . . . day of . . . ., 1891, shall not be reviewed, on the ground of gross irregularity in and about the refusal by the said Licensing Court of the renewal, then and there duly applied for by the plaintiffs, of a retail wine and spirit license, theretofore for three years and upwards held by them upon certain conditions for and in respect of certain premises situate at . . . . in . . . . aforesaid, which renewal the plaintiffs were under and by virtue of the 50th Section of Act No. 28 of 1883, entitled to by law, and to which renewal no lawful objection was raised in accordance with any of the provisions of the said Act or any other law (as will more fully appear by reference to the record of the aforesaid proceedings as the said record was taken at the time, when such record is produced in Court), but the said renewal was in a grossly irregular manner refused, without notice to the plaintiffs of any objection, and without the hearing of any evidence for and on behalf of the plaintiffs then applicants for the said renewal.

And command the said W.C.S. as such Resident Magistrate as aforesaid to return and certify to the Supreme Court the aforesaid record.

And also command the said members of the said Licensing Court, the defendants, to shew cause why the plaintiffs should not be declared entitled to a renewal of the aforesaid license upon the same conditions upon which the plaintiffs had theretofore held the same as aforesaid : and further to shew cause why they should not be ordered to pay the costs of these proceedings, *de bonis propriis :* as it is said.

And serve on each of the said defendants a copy of this summons, and return you then and there this summons immediately after the service thereof, with whatsoever you have done thereupon.

Witness, etc.

Summons to review the proceedings of a Magistrate in a civil case.

(Heading.)

Command F. of . . . . in his capacity as Resident Magistrate of . . . ., hereinafter called the defendant, that he appear before our Supreme Court of our said Colony at Cape Town, on the . . . . day of . . . . at 10 o'clock in the forenoon, when an application will be made on behalf of G. of . . . . in terms of this summons, and at which time he will be required to produce, return and certify to the said Supreme Court, the record, or a true copy, of the summons, pleadings, records, evidence with all objections, and all other proceedings in the case of one K. against the said G., in which the said K. claimed from the said G. the sum of £ . . . . sterling for damages for alleged slander, tried before the said Magistrate on or about the . . . . day of . . . . last past, and in which he gave judgment against the said G. for the sum of £ . . . . sterling.

And further command K. also of . . . . to appear before our Supreme Court at the date, hour and place aforesaid to answer the said G. and to shew cause why the judgment of the said Magistrate and all the proceedings before him in the said case shall not be reviewed, set aside or corrected, upon the following grounds :—

1st. Because the said Resident Magistrate has upon the trial of the said cause, rejected legal and competent evidence then and there tendered on behalf and in defence of the said G., viz. the evidence of the witnesses (*here name them*).

2nd. Because of the gross irregularity of the said proceedings in that the said Magistrate unlawfully and unjustly declined to receive and to act upon and to allow evidence to be called in proof of certain pleas tendered by the agent of the said G. for and on his behalf as his defence to the said action whereby he was greatly injured and prejudiced in his defence, also by the refusal of the said Magistrate to allow the reasonable and proper questions put on behalf of the said G. to be answered by the said K. Also because there was no evidence, or not sufficient evidence to justify the said Magistrate to give judgment against the said G.

3rd. Because the proceedings in the case by the said Magistrate were otherwise wholly irregular and contrary to law.

As it is said : and serve on each of the said defendants a copy of this summons, and return you then and there this summons immediately after the service thereof, with whatsoever you have done thereupon.

Witness, etc. (usual conclusion).

CHAPTER XXXIII.

HYPOTHECATIONS, CONVENTIONAL AND TACIT; PLEDGES; LIENS; AND THE ORDER OF PREFERENCE OF ALL DEBTS.

THE Chapter on "*Proofs of Debt*" should be read in connection with this. Having proved the claims on the estate, the next step is to know their "legal order of preference." This can best be discussed under the combined heading given above.

The 33rd section of the Insolvent Ordinance, after stating the mode of settling, or ranking, the claims to be :—

a.—The principal sum of each debt on which the arrears of interest shall be accumulated as at the date of the order of sequestration ; and

b.—The principal sums of such debts as do not bear interest, or for which there may be a rebate of interest, as not being payable till an after period :—

goes on to say that the "Assets of the insolvent estate shall be applied first in payment, according to the legal order of preference, of all the preferent debts and the preferent interest due and which shall accrue thereon," &c., the practical operation of which I shall now show in this Chapter. Yet, before doing so, I must first explain some legal terms which, though familiar to the practitioner, are not so to the young beginner.

The term "Mortgage Bond" was not known to our law. It is derived from the English law, "mort"—dead, "gage"—a pledge ; literally, "a dead pledge," that is, in other words, a pledge of immovable property. Our law term for it is *Hypothecation, i.e.*, a hypothec or security of immovable pro-

perty. It has, however, exactly the same meaning as the English term "mortgage bond," and being used in the translations of some of the law books, and having been adopted by us in practice, it would be useless to attempt to drop this term and to substitute for it, in practice, the term "hypothecation." Many practitioners here define "hypothecation" as an additional, or better, security to an existing mortgage bond; but this is wrong: it is as defined above, whether there be one or several mortgage bonds for the same debt, the latter securing the former.

The term *Kusting-brief* is an hypothecation, or bond, passed for the purchase, or balance purchase, money of the property hypothecated, or mortgaged, and must be passed *simul ac semel*, or as some writers say, *pari passu*, with the transfer of the property, that is, *at one and the same time.* Thus, if the transfer of the property is passed on one, and the bond on another, day, the latter would not be a "kusting," and thus not entitled to the same protection as a "kusting brief." A "kusting brief," where the sale of the property has been *bonâ fide*, ranks preferently even to tacit hypothecs on that property, but a mortgage bond does not. Hence the greater facility in obtaining a loan as a "kusting" than as a mortgage bond.[1]

The term "*Pledge*," with us, applies to movables only, just as the terms "hypothecation" or "mortgage" apply only to immovable property. It is true that, in practice, we sometimes use and apply the terms indiscriminately, but it would be more correct if we adhered to the legal definition.

Kinderbewys is a deed by a surviving spouse, shewing the amount due to the minor children out of the estate of the deceased spouse. This deed, to be of any use, must be either notarial or passed before the Registrar of Deeds, and must also be registered. It is passed before a notary where nothing special is to be hypothecated; and then it takes the nature of, and has the same effect as, a notarial bond. If immovable property has to be hypothecated as security, it must be passed

[1] Lybrecht, Vol. 2, Chap. 27; Grotius, 2, 48, 49; Schorer, § 265; Van der Keessel, 438; *Van der Byl and Meyer* vs. *The Sequestrator and Attorney-General*, 1 M., 318; *Croser* vs. *Sequestrator and another*, Ibid, 330.

before the Registrar of Deeds, and it then has the same effect as any other mortgage bond. But the amount a child is entitled to out of his deceased parent's estate can always be ascertained from the liquidation account; and, as a child has a tacit hypothec for his inheritance on his deceased parent's estate, this must necessarily be a better security to him than, for instance, a notarial general bond. For, unless the will specially directed the nature of the security to be given by the surviving spouse, he or she need do no more than pass a notarial general bond. But such a kinderbewys, no matter what may be the security under it, does not do away with, nor cancel, a child's tacit hypothec; nor does it preserve it. Hence, the question naturally arises, What is the use of a kinderbewys? The only use I can see for it is, that when the right to the tacit hypothec has ceased by effluxion of time,[1] the children can claim their shares by virtue of the bond securing them.[2] But unless the security of the children, under a kinderbewys, be absolutely safe to cover their inheritance, it would be better for them to rely on their tacit hypothec in case of insolvency, and to prove their claim as a tacit hypothec, using the kinderbewys only as proof of the amounts due to them. Of course, if a child, after coming of age, chooses to take a mortgage bond, or a kinderbewys, or any other security, he will be regarded as having novated his claim, and thus lose his tacit hypothec.[3]

Having given these preliminary explanations, I shall now, in order to make this Chapter as plain as possible, divide it into, and discuss it under, several heads.

HYPOTHECATIONS are divided into: (*A*) *Legal* (or tacit), and (*B*) *Conventional.*

Legal (or tacit) are divided into: (*a*) *General;* and (*b*) *Special*, also called *Liens.*

Conventional are divided into: 1st (*a*) *Movable;* and (*b*) *Immovable.* 2nd (*a*) *General;* and (*b*) *Special.*

[1] Act 5 of 1861, § 3.

[2] For analogy see *Naudé* vs. *Naudé's Trustee*, B., 1869, p. 166.

[3] *Lutgen's Heirs* vs. *Trustees and Curators of Lutgen*, 2 M., 312; 4 Hol. Con. 106 and 267; Loenius, 33.

A.—Legal or Tacit Hypothecs.

These take place by operation of law, and may be not only without one's knowledge or consent but even against one's wish; thus, an unborn child has a legal or tacit hypothec on the estate of its deceased father for its paternal inheritance.

It is called legal because it takes place by operation of law without any act, or agreement, or knowledge of any kind; and it is called tacit for the same reasons, and also because it may be against one's wish, and without notice of any kind, and even in favour of one's unborn children. In ancient times the word "legal" was more generally used, while in modern times the term tacit is more frequently used; but, as a matter of fact, there is no difference between the two terms. They have the same meaning and the same legal consequences, and it is only a matter of custom or usage which shall be used, though the term tacit has become a more popular term now-a-days.

The rule in legal or tacit, as well as conventional, hypothecs is *Quod qui prior est tempore in pignore potior est iure;* or, more briefly in later days, *qui prior est tempore, potior est jure.* Thus, whether the order herein stated is correct or not (it is as nearly correct as possible), this rule, derived from the Civil law, must be observed in the application of each case.[1] To this *general rule,* however, there are, for good reasons, *certain exceptions,* as stated below under *a, b,* and *c,* which must always take precedence of all other hypothecs, because (1) No estate can be interfered with without due representation and administration. (2) It is, for sanitary reasons, to the interest of the community that people should be buried; and (3) A person should not be deserted in the hour of death, and, therefore, *death-bed* expenses should be preferent. *Besides these three exceptions, which must take precedence over every other hypothec, tacit or conventional,* the rest all fall under the primary rule above-mentioned, "that which is first in order of time is first in law," or more

[1] 2 Hol. Con., 40.

simply, "in whichever order they occur, so they rank." This doctrine applies not only to tacit or conventional hypothecs of movables or immovables, but also to liens. In settling this order, it may be necessary to find out, not only the day or the hour when the hypothec took place, but also the very *minute*, for it is the rule that when two hypothecs take place on the *same day*, and it cannot be ascertained which was prior in *point of time*, they rank together; but when a question arises as to *point of time*, the very minute, *or point of time, must be ascertained*[1]; for the moment the hypothec has once attached, the person who disputes it must prove his priority. If, then, a person's hypothec has once begun, whether tacitly or conventionally, and whether specially or generally, he is preferent to a later claimant who has no hypothec. Though a prior tacit hypothec is preferent to a later conventional one, and a later special conventional hypothec is preferent to a prior general conventional one, yet, as between all the hypothecs and a non-hypothec, the latter has no preference whatever, though of a later date. It is for this reason that a judgment, though later in date to any and every hypothec, creates no preference over any hypothec.

The following legal or tacit hypothecs are still in force in this Colony.

a. The sequestration and administrative costs: because, before any estate can be intermeddled with, there must be some person placed in legal possession thereof, whatever process it may be necessary to adopt, and the estate must be legally administered before there can be any distribution of the assets. Therefore, all necessary legal charges for bringing the estate into the position of being ready for distribution must first be deducted. As to what are the necessary legal charges of administration, depends upon whether such charges had necessarily to be incurred, either in bringing or defending an action, or doing any other legal act to protect the interests of the estate. Thus, the necessary costs of an action *after* the sequestration, not before, are legitimate administrative charges. Otherwise, *judicial costs are not*

[1] Kersteman, Tit. "Hypotheek."

preferent, except sequestration costs, and these begin from the moment costs have to be incurred to issue a writ of execution, viz., the usual item at the outset, "Instructions to issue a writ of execution," the costs on the said writ, and the costs for placing the estate under sequestration: if the sequestration be voluntary, these costs will begin with the making up of the schedule and the valuation of the estate and the proceedings therein; if it be compulsory, the costs will be those of petition and affidavit for sequestration and the proceedings therein.[1] In the case of *Van der Byl* vs. *Langford's Trustees*[2] the Court held that the costs in establishing a proof must be treated as part of the costs of administration, and therefore provable as a preferent claim. Costs of the voluntary surrender of an estate are preferent as being also part of administrative costs;[3] and so also are the costs of a trustee or executor, and the attorney can claim such costs from the Sheriff who has levied them.[4]

b. The necessary suitable and reasonable funeral expenses.—These must be according to the social position, habits and modes of life, and the usual or average pecuniary means of the deceased. They must not be lavish, nor must unnecessary pomp or show be indulged in, but the proceedings must be plain, simple, and without ostentation, and under all the circumstances suitable, to entitle the undertaker to a preference. Under the term "general expenses" are meant only necessary expenses to burial and a plain coffin, but not a tomb-stone for the grave of the deceased, nor mourning clothes for the surviving spouse and children. *These necessary funeral expenses are preferent to the rent of a landlord, and the other necessary "death debts" (dood schulden) such as doctor's, surgeon's, or chemist's accounts.*[5] In the case of *Wilson and others* vs. *Bruton*, in March, 1902 (not reported), the Supreme Court decided that mourning clothes to a widow and her

[1] § 22 Insol. Ord.; *Tiffin* vs. *Est. Franks*, B., 1876, p. 50; 3 Hol. Con., 139; 3 Berg, Adv., 201; Ibid, 4 Con., 6.

[2] 7 J., 235.

[3] *Du Preez* vs. *Trustee Boles*, 2 J., 386.

[4] *Thomas* vs. *Barker*, 2 M., 321.

[5] 1 Berg, Ned. Adv., 223; *Tiffen* vs. *Franks*, quoted above; Grotius 2, 48, 14; Schorer, § 245; Coren, 38.

daughter cannot be charged to the estate of the deceased husband and father.

c. The Physician's, Surgeon's, and Chemist's Accounts, but only for so much thereof as represents, and was necessitated by, the last illness, of which the insolvent died. This preferent tacit hypothec for the last illness was established on the presumption that the services so rendered were endeavours to prolong, if not to save, life, and also that people who are ill should not be abandoned in time of sickness or be neglected, if it be known that their affairs do not stand firmly. This point was decided by the Supreme Court of Holland on 21st May, 1612, in the case of *Dirk Schout*, and has ever since, in that and in this country, been acted upon. But it is to be borne in mind that *this preference is only if the person dies insolvent*, or if his estate, after his death, is surrendered as insolvent, but not if he only surrenders his estate as insolvent, and is tenacious enough of life not to die; *and the preference, in the case of death, is only for the last illness of which the deceased died.* If there is a whole year's account due by the deceased, but he died from a cause quite different from that for which he was formerly treated, the preference is only for such item, or items, as were caused, or incurred, through the last illness. The rest of the account is concurrent. As to these items of the three gentlemen named, that are preferent on death ensuing, they also follow the rule "*qui prior est tempore, potior est jure*," and not necessarily the total accounts of each, but the several items as they were from time to time incurred. The question of the hour, yea, even of the minute, as to whose was incurred first, is sometimes of importance in deciding precedence, as when there are not sufficient assets in the estate to pay each one's account in full. For instance, if the physician prescribes at ten o'clock, and the apothecary makes up his prescription one minute later, and the surgeon performs his operation another minute later, their respective charges must rank in order of preference as their work was done, and so on throughout the whole account of each one for the last illness. All other charges are concurrent, *and none are preferent if the party does not die insolvent.* Of course, no medical man or

chemist wishes his patient to die in order that his own account may be preferent![1]

d. The State, on the property of those who have had any control over, or receipt of, the revenue; for instance, all those who are in any way engaged in collecting or controlling revenue due to the State, such as the various receivers of revenue from customs or railways, Civil Commissioners, the Vendors of Stamps, Collectors of House Duty, the Collectors of Excise, *i.e.*, Excise Duty due by a distiller. Though the Government may take security from its officers, this does not dispense with the tacit hypothec upon their estates. The Government tacit hypothec dates from the date of the Collector of Revenue's appointment,[2] or from the date of the appointment of any other person, no matter by what title he may be known or called, who is employed in the collection or administration of Government revenues or funds, and, as we have made no change in the law on the subject, this preference still lasts for a third of a century.[3]

e. The Government Quitrent.—This, being a real right on the landed property, is *preferent to all other claims or hypothecs on the land.* But this preference, which formerly held good for a third of a century, is now limited with us to three years.[4] Any quitrent due for more than three years must rank, therefore, concurrently. Beyond the reduction from a third of a century to three years, the rest of the law of Holland on the subject, with a trifling exception, is still in force.[5]

f. Minors, on the property of their guardians for what is due to them. Formerly this preference lasted for a third of

[1] Van Alphen, Vol. 1, pp. 482 and 485; 6 Hol. Con., p. 327; Van der Keessel, 418 and 452; Schorer, § 248; *Ryneveld* vs. *Juritz*, 2 M., 318; *Re Est. Wolf*, 6 J., 127; Zutphen, Prac., Tit. "Doodschulden," Nos. 1, 3, and 7. [N.B.—This last work gives more references on the subject than any other.]

[2] Berg, Ned. Adv., Vol. 4, Con. 213.

[3] Placaat 1st August, 1658; 2nd Feb., 1679; and 22nd July, 1749; Loenius, 69; Grotius, 2, 48, 15; *Treasurer-General* vs. *Bosman's Trustees*, 2 J., 262; *Hunter's Trustee* vs. *Col. Gov.*, 4 J., 448; *Van der Byl and Meyer* vs. *The Sequestrator and the Attorney-General; Croser* vs. *The Sequestrator and another; Cloete* vs. *Col. Gov.*; *Re Woeke*, 1 M., 318, 330 and 554; *Chase* vs. *du Toit's Trustees*, 3 S., 78.

[4] § 2 of Act 52 of 1861.

[5] Ord. 9 of 1844; and the *Colonial Government* vs. *Fryer and Huysaman*, 4 J., 313.

a century, but is now reduced by us to three years from the date on which the minors attain their majority; but if a minor is absent from the Colony at the time he becomes of age, he is entitled to three years from the day of his return to the Colony. But in no case is he entitled to more than five years from the day of his majority.[1] Of course, as long as the minor is not of age, he has his hypothec on the estate of his guardian from the moment of the latter's appointment by the Master. Such hypothecs have the same effect as a special hypothec, and have their preference before all bonds of a later date, except "kusting brieven." This hypothec is also on the estate of a minor's surviving parent, and even of a stepfather or a stepmother, when he or she has been married in community of property; and also in respect of a *fidei commissary* inheritance. The legal hypothec of a minor is not lost by his death, but passes on to his heirs; and minors, born and domiciled abroad, have the same right as Colonial minors on the Colonial estates of their guardians resident in the Colony.[2] But if children who are of age deliberately take a bond for their portions, or any other security, or make any other arrangement, they must be presumed to have waived their hypothec, and thereby to have novated their claim, and thus forfeit the benefit of their tacit hypothec.[3]

g. Insane persons, prodigals, and interdicted persons, on the estates of their curators, for debts due by them in their capacity. Formerly this was also for a third of a century, but is now reduced to three years from the date they ceased to be under curatorship, if in the Colony; and if absent, then from the day of return to the Colony, but in no case to exceed 5 years.[4]

[1] § 3 of Act 5 of 1861.

[2] 2 Menz., 353; *Executors of Van der Poel* vs. *Marais and others*, Ibid, 360; 2 Hol. Con., 40; Grotius, 2, 48, 16; Van der Keessel, 421 and 422; Schrassert's Cons., Vol. 2, Con. 87; Schorer, §§ 247 and 264; Placaat 9th August, 1780, Vol. 9, p. 554; *Re Liesching*, 2 M., 329; *Re Barry's Trustee*, 3 J., 249; 1 Hol. Con., 140, 227, and 300; 3 Ibid, 49, 174, and 299; 4 Ibid, 199 to 203; 5 Ibid, 133; 6 Ibid, 168; *Hiddingh* vs. *Roubaix*, B. for 1878, 36; *Oosthuysen* vs. *Moffat*, 5 J., 319; *Hull* vs. *McMaster*, 1 R., 401; Act 5 of 1861, Sub-Section 3 to § 8; *Jennings* vs. *Van Wyk*, 7 J., 228; 3 Berg, Ned. Adv., 164, 165, and 240; 1 Ibid, 218; Sande, 3, 12, 2; Van Leeuwen, 4, 13, 11.

[3] 4 Hol. Con., 106 and 267; Loenius, 33.

[4] § 3 of Act 5 of 1861.

h. The Lessors of houses or lands, on all movable property brought therein or thereon, by the lessee, or by any other owner for his (the lessee's) use, and on all the fruits which grow upon the land. This hypothec was also for a third of a century, but cannot now be claimed preferently for any sum greater than one whole year's rent. The rest of the rent due is concurrent.[1] Beyond the alteration of the duration here mentioned of the preference, the rest of the doctrine of the rights of the landlord to all things brought, *invecta et illata*, for use on the premises, is still in full force.[2] Thus, for instance, the landlord's tacit hypothec has effect on the separate property of the wife married by ante-nuptial contract, who has brought such property into a house rented by her husband, and in which they have resided.[3] So, too, the goods of a third person, if brought on the premises with his consent for the use of the tenant, and for other than merely temporary purposes, are subject to the landlord's preferent claim; but if they are there for only temporary purposes, such as the hire of a piano at a monthly rental, and which the landlord cannot infer that they belonged to the tenant, the hypothec does not attach.[4] As a rule, the goods of a third person are not subject to the lien without the consent of the owner, but this consent may be implied from the conduct of the owner in leaving the goods in the possession of the tenant under such circumstances as would necessarily lead the landlord to believe that the goods belonged to the tenant.[5] So, also, a lodger's furniture, brought into the house with the object of remaining permanently there, has been seized by the landlord for rent, and held good;[6] and the hypothec extends also over a stranger's furniture left for the tenant's permanent use.[7] The landlord's hypothec exists upon the tenant's goods so long only as they remain on the premises,[8] and ceases with their removal;[9] but,

[1] § 5 of said Act.

[2] Van der Keessel, 423 and 428; Regts., Obs. 1, Obs. 72; Grotius, 2, 48, 17; Schorer, § 249; 5 Hol. Con., 52 and 53; *Goodall* vs. *Flower*, 1 J., 143.

[3] *Crowley* vs. *Dominy*, B., 1878, p. 205.

[4] *Lazarus* vs. *Dose*, 3 J., 42.

[5] Ibid.

[6] *Ulrich* vs. *Ulrich's Trustees*, 2 J., 319.

[7] *Cholwich and Simpkins* vs. *Penny*, 5 E.D.C., 270.

[8] *Domisse* vs. *Theart*, 4 J., 92.

[9] *Price* vs. *Cloete*, 3 J., 139; *Warren* vs. *Clements*, 1 C.T., 287; *Greeff* vs. *Pretorius*, 5 C.T. 132.

of course, they may be interdicted from being removed; and may be arrested also, by order of a Judge, on their way during removal and before they have reached their place of destination.[1] A landlord has no tacit hypothec on the goods of a *bonâ fide* sub-tenant, beyond the amount due for rent by the sub-tenant to the tenant: in other words, the landlord has a preferent claim only for the amount of rent owing by the sub-tenant to the tenant.[2] The landlord's hypothec is also on the fixtures as well as on the stock.[3] Though, as stated, the rent is preferent now for twelve months only, yet the rent which accrues from the day of sequestration must be treated as part of administrative costs, and will be preferent like other preferent claims on the estate. But a person who has let his house for prostitution, or other immoral or illegal purposes, is neither preferent nor concurrent, and cannot even sue for the rent, inasmuch as such rent is *contra bonos mores.*

i. The Master of a ship, on the ship and cargo for his freight.—The Act of 1861 did not alter this, and we have therefore still the law of Holland in force as to the right of retention for freight. The alteration made by the Act applies not to freight, but to repairs and building of ships out of the possession of the builder; but, while he has possession, he has still the right of retention. This alteration applies also to persons in this Colony supplying tackle, apparel, furniture, or stores to ships owned by persons in this Colony.[4] The preference for freight is founded upon the doctrine of the *jus retentionis;* but, of course, this preference is lost in respect to the cargo, or to so much thereof as may have been delivered, from the moment that delivery has been made. But, so long as the shipper, or some one on his behalf, has retention, the preference continues for an unlimited period, and he may retain the goods till he is paid, unless there is at any time proof of waiver.[5]

j. The Merchant, on the ship belonging to the master, for

[1] *Board of Executors* vs. *Stigling,* B. for 1868, p. 25, and see also Chapter "*Arrests.*"

[2] *Smith* vs. *Dierks,* 3 J., 142.

[3] *Goodall* vs. *Flower,* 1 J., 143.

[4] Sub-sects. 5 and 8 to § 8.

[5] 1 Berg, Adv., Con. 101; 4 Ibid, Con. 208; Schorer, § 243; *Anderson & Co.* vs. *Laurenberg,* 1 R., 145; and *Denyssen* vs. *McFie,* 3 S., 334.

compensation for his goods sold in case of need by the master. This is still in force, and is derived from the law of Holland, and lasts for a third of a century.[1]

k. A Factor or Commission Agent, on the goods sent him on commission for advances made on those goods by him to the owner. This is also still in force, and lasts for a third of a century.[2] Also, an agent for the landing and sale of goods has a lien or tacit mortgage upon goods for the amount of his reasonable expenses incurred in the landing and sale of the goods; and he may therefore retain them until he is paid.[3]

l. A married woman, married out of community of goods, on the property of her husband, for restitution of the property brought by her at the time of, or acquired during, marriage from any other source than her husband. This is also unaffected by the Act of 1861, and is still in force, and lasts for a third of a century.[4] But it is to be observed that this hypothec of the wife on the husband's estate is only when he retains the administration of her estate, and not when he has been excluded from it either by direct words or by a general expression retaining the control of her own property; or where, by operation of law, such as in the case of the clandestine marriage of the minor, the marital power is excluded. Therefore, for money lent by a wife to her husband, she has no tacit hypothec on the estate.[5] And if she wishes to have a preference, she should obtain a bond securing the money in the usual way. Of course, this does not affect the question of the preference of the wife, in certain cases, under her antenuptial contract.[6]

m. Legatees, for their legacies or bequests on the property left by the deceased. This preference was formerly also for a third of a century, but is, by the Act of 1861, limited to twelve months from the day on which the legacies became due or demandable: but, in the case of a minor or one under

[1] Van der Linden, Bk. 1, Chap. 12, § 12.

[2] Ibid; and *Denyssen* vs. *McFie*, 3 S., 334.

[3] *Walker* vs. *Durant & Co. and Fraser*, 2 J., 361.

[4] 2 Hol. Con., 79 and 96; 4 Ibid, Con., 266; 1 Berg, 169 to 178; 2 Berg, 90 and 213; 3 Ibid, 75 and 76; 4 Ibid, 240; Sande, 2, 2, 8; and Ibid, 3, 12, 3.

[5] *Ruperti's Trustee* vs. *Ruperti*; and *Mostert's Trustee* vs. *Mostert*, 4 J., 22 and 35.

[6] *Re Paterson*, B. for 1868, pp. 68 to 95 and 143; and 7 P.C., N.S., 133.

a curator, or one absent from the Colony, such legatee shall be entitled to his preference for twelve months from the time when such disability ceases: but in no case shall the preference subsist for a longer period than five years, unless in the case of a minor, who shall have a further period of three years after attaining his majority.[1]

n. Attorneys, Notaries and Conveyancers have a lien or hypothec for their costs and charges for *any specific work done in, or on, the preparation of any document or deed;* and also, if, in order to effect a transfer, they hold a preferent lien on all such papers. But, though they have the right of retention of such documents as against all the world till the payment of their lien, they must give them up to the trustee of the client's insolvent estate for realisation and administration; but in doing so they should at the same time intimate that they retain their lien.[2] But (though where an attorney has prepared the title-deeds, he would have his tacit hypothecation in respect of his charges thereon) he has no lien on them merely because they were handed over to him for the purpose of passing a mortgage bond. He could refuse to give up the mortgage bond to his client till his charges for preparing it are paid, but he could not refuse the client the transfer upon which the bond was passed. To the trustee of an insolvent estate he is bound to give up both, but retains his lien if he notifies it; if he parts with the deed without such notification, then he is presumed to have tacitly waived his lien.[3]

o. Just as a lawyer has his lien for his work done on any particular document, and the *jus retentionis* till he is paid, so also have the following parties; and they, like the lawyers, in case of insolvency, give up the subject-matter of the lien to the trustee of their debtor, to be realised, but retain their lien, and they must make their proof of debt in the same form as the lawyer.

[1] § 4 of Act 5 of 1861.

[2] *Kellar's Trustee* vs. *Edmeades; Trustees Tritch* vs. *Berrange & Son*, 3 J., 25 and 217; *Jewell & Rutter* vs. *Hazell*, 7 C.T. 23; Ibid, 14 S.C. 16; G.P.B., Vol. 2, p. 722, Art. 80.

[3] See also *Hudson's Trustees* vs. *Wiley*, 4 E.D.C. 299; *Queenstown Assurance Co.* vs. *Wood's Trustee and others*, 5 J., 327; §§ 27, 30, and 48 of the Insolvent Ord., and Chapter "*Proofs of Debt.*"

A watchmaker, for his repairs to a watch.

A wagonmaker or *coachbuilder*, for repairs to a vehicle.

An hotel or a boarding-house keeper may retain the goods of a lodger till his account for board and lodging is paid.

A livery-stable keeper may retain a horse till his account for livery and bait is paid, and may also retain the saddle and harness till his account for their cleaning is paid.

A laundress may retain the clothes she has washed till her account for their washing (not for any clothes already delivered) is paid.

A tailor may retain clothes he has repaired till he is paid.

A dyer may retain the clothes he has cleaned, scoured, and dyed till he is paid.

So may the *cobbler*, the *saddler*, the *upholsterer*, the *blacksmith*, the *farrier*, and everybody else, retain a lien upon the goods or things upon which he has expended his work and labour. But the moment he parts with the thing without an intimation of his lien he loses the lien, and *the lien when once lost does not revive*, though the thing may come into his possession again.[1] Certain exceptions, however, to this rule will be found further on.

p. He who has lent money (though he be not the undertaker) for necessary funeral expenses has preference for that money. Some writers dispute this, but the majority of modern writers are in favour of this preference.[2]

The following hypothecs mentioned by Van der Linden[3] were never, and are not now, in force in this Colony, because they were created for purely local taxation purposes in Holland: The Dike Board, or Reeve, for the expenses of the dikes, dams, mills, sluices, reservoirs.

The following tacit hypothecs, derived from the law of Holland, were formerly in force here also, but are now repealed by Act 5 of 1861 :—

To masons, carpenters, labourers, servants, bleachers of linen, or washerwomen.[4]

[1] See also Schorer, § 254.

[2] Zutphen's Prac., Tit. "Doodschulden," n. 7; Kersteman's Woordenboek, Tit. "Hypotheek," p. 259; and Van der Keessel, 418 and 452.

[3] 1, Chap. 12.

[4] See also *Clark* vs. *Denny*, 4 E.D.C., 300.

The towns, villages, or municipalities, on the property of their tax-collectors, or administrators of their revenues.

The Churches, on the property of the administrators of the Church property; such as the Kassier Diakens of the D. R. Church, or the treasurers of other churches.

All public bodies and institutions, for the revenue not accounted for by their officers.

The Government hypothec on the estates of auctioneers, and deputy post-masters and contractors.

The hypothecs of minors on the estates of their pro-tutors of assumed tutors and of agents.[1]

For the building and repairing of ships and houses; or for money lent for the repairs of houses.

For supplies of ships owned by persons in this Colony, with tackle, apparel, furniture, or stores.

The tacit hypothec of landed property *bonâ fide* sold for valuable consideration to any other person than the mortgagee.[2]

The following had, and still create, no lien, and are not preferent:

a. Mourning clothes for surviving spouse or children.[3]

b. Judicial costs, other than sequestration and administrative costs.

c. Doctor's, or *Surgeon's*, or *Apothecary's* general account, *except for last illness* which caused death.

d. The State for anything else due to it than the collection of the revenue.

e. Fines and penalties levied in favour of the State.[4]

f. Divisional Council Taxes.

g. An Agistor, for agistment.[5] If I understand this judgment rightly, then, with all due respect, I do not see upon what ground the Court held that an agistor has no lien. It is so by the English law, but the principles of our law of the doctrine of the right of retention are against this decision.

h. An *Accountant*, for the statement of his accounts,

[1] See also *Re Barry's Trustee*, 3 J., 249.

[2] § 9 of the said Act.

[3] Coren, Dec. 38,

[4] Grotius, 2, 48, 15; Regts. Obs., p. 2; Obs., 61; 3 Hol. Cons., 166; and 4 Ibid, 135.

[5] *Momsem* vs. *Mostert*, 1 J., 185.

because the statement itself, and not the books, is that upon which his work is done.[1]

i. An *Auctioneer* has no hypothec on the proceeds of a sale held by him. He can be compelled by the trustee to render an account of the sale, and to pay over the sums received. Of course, as between the auctioneer and the insolvent, in regard to any sale held before insolvency, the Court must deal with it as with every other transaction of the insolvent; and if it can be proved that a sale was held with the intention of preferring the auctioneer, it would be treated like every other undue preference.

j. Arrests.

k. Judgments.

l. Writs of execution.

m. Attachments.

But as to attachments by virtue of a writ of execution, there is a slight qualification to be made, so long as there is no insolvency intervening before the proceeds of the sale are paid over to the creditor. As this question is of frequent occurrence, I will give the latest decisions more fully.

By the Roman law the claim of a judgment creditor was postponed to that of the mortgagee, whether general or special, when rights had previously vested, and no distinction was made as to movables or immovables. But the Dutch law changed this, and the Dutch Courts held that movable property upon alienation by the debtor and delivery to the alienee, became freed from the burden of hypothecation, on the ground of the rule "*Mobilia non habent sequelam.*" But, so long as there is no alienation by the debtor, the hypothec attaches; but not, as will appear later on, as against an execution creditor. It is for this reason that, *to make an hypothec or pledge of movable goods, there should be delivery to the creditor.* And by the Placaat of the 1st of April, 1580,[2] it was further enacted "that the hypothec took effect only over the goods under the jurisdiction of the Court where the

[1] *Spangenberg's Trustee* vs. *Cousins*, 2 M., 343; *Trustee Walker* vs. *Jones & Co.*, 2 J., 354.

[2] Placaat Boek, Vol. I., p. 338, § 35, sometimes called the "Political Ordinance."

property is situate, and not on goods outside the jurisdiction." Therefore, a judgment, or the *pignus judiciale*, is no mortgage at all, and it gives one creditor no preference over the other, nor can a judgment defeat the rights of a general mortgagee over the debtor's lands, nor over the movables. *Primâ facie*, therefore, a mortgagee has a right of preference over a person whose claim attaches subsequently, and it rests with the judgment creditor to prove by authority his right to a preference if he seeks to establish it.[1] But, though a judgment creditor gets no preference of any kind by virtue of his judgment *per se*, yet, when he proceeds to execution and attachment, and sells by virtue of the attachment, he would be preferent, on the proceeds of the sale, to a prior general mortgagee or pledgee of movables unaccompanied by delivery. But this applies only as between the execution creditor and the general mortgagee of movables not delivered, not as to other creditors, nor as to pledges duly delivered. In the case of *Cloete* vs. *Colonial Government*,[2] the Supreme Court decided "that a pledge of movables completed by tradition is preferent to a prior tacit legal general hypothec." In the case of *Hare* vs. *Trustee of Heath*, which should be constantly borne in mind,[3] the Court also decided "that a prior general hypothec was preferent to a subsequent special hypothec of movables, not followed with possession." And the Chief Justice further said, as follows :—

"The mortgagee . . . . in whose favour a notarial bond had been passed, but without delivery, had no greater security than was afforded by the personal honesty of the debtor. He took his mortgage subject to all prior special or general hypothecations affecting the property, and if the debtor chose afterwards to alienate the property, or even if the property were judicially attached at the suit of another creditor, the mortgagee (or pledgee) lost his right of preference *pro tanto*. But, so far as the concurrent creditors were concerned, he might, in a *concursus creditorum*, claim a preference to the extent of the value of the mortgaged articles in the possession of the debtor or his trustee in insolvency."[4]

[1] Grotius, 2, 48, 9, and 36; Van der Keessel, 438; Neostadius, Dec. 35; Schorer, by Maasdorp, §§ 248 and 263; Voet, 20, 1, §§ 14–16, and 20, 4, 28; 2 Hol. Con., 11 and 40; 3 Hol. Con., 114 and 174; Wassenaar, Chap. 22, n. 67.

[2] 1 M. 554.

[3] 3 J., 32.

[4] See also *Kearns and others* vs. *Cole*, 3 C.T., 82 and 10 J., 63; and *Hofmeyer* vs. *Gous*, 3 C.T., 98; and 10 J., 115.

In the case of *Mangold Brothers* vs. *Eskell*,[1] the Chief Justice said :—

"The attachment . . . . after judgment gave the plaintiff a *pignus judicidle*—a judicial lien—upon the goods so attached which has preference over all prior mortgages which had not been completed by delivery. . . . Whatever value the law may attach to a mortgage of movables without delivery . . . . it is clear that such a mortgage is in no better position than a tacit general hypothec, and that any advantage it may give the mortgagee is defeated by a judicial attachment at the suit of a *bonâ fide* creditor. . . . When the debtor becomes insolvent before the money realised by the sale of the goods taken in execution is paid to the creditor, his preference ceases, except for his costs in execution, but this result takes place by virtue of a provision of the Statute Law (Ord. 6 of 1843, § 22)."

But movable property delivered to a mortgagee after judgment, but before execution, of an unsecured creditor cannot be seized in execution of that judgment.[2] Nor has an execution creditor a preference on a *bonâ fide* pledge duly delivered to another before an attachment is made, though such pledge has not been registered.[3] Following out the same principles in some of the cases above instanced, the Supreme Court, in the case of *Guest* vs. *Le Roux's Trustee*,[4] reiterated the former doctrines as to the preference of a prior general hypothec over a later special hypothec unaccompanied by delivery; but as in this case there was a temporary delivery, and the goods afterwards were returned to the pledgee, the Chief Justice added :—

"In cases of this kind we must look at the real substance of the transactions, and not at the fictitious forms which the parties have adopted for certain purposes."[5]

n. A purchase and sale of movables or immovables and the payment thereof, but without obtaining delivery, create

[1] 3 J., 48.

[2] *Haupt* v. *Hancock*, 2 M., 347.

[3] *Van de Venter* vs. *Moss & Webb*, 4 E.D.C., 222; *Payne* vs. *Yates*, 9 J., 494; *Hofmeyer* vs. *Gous*, 3 C.T., 98; *Stratford's Trustee* vs. *The L. and S. A. Bank*, 3 E.D.C., 439; *Louw* vs. *Andrews*, 14 S.C., 27.

[4] 5 J., 119.

[5] For further references see *Sequestrator* vs. *Thomson and another*, 1 M., 479; *Blanckenberg* vs. *Guardians of Land*, Ibid., 483; *Scheuble* vs. *Van der Berg and another*, Ibid., 537; *Cloete* vs. *Colonial Government*, Ibid., 554; *Louw* vs. *Andrews*, 7 C.T., 40; Van der Keessel's "Dictata ad Grotium," 3, 8, 1, and his Thesis, 536; and as to the English and Scotch Laws, see House of Lords Reports, 72 L.T., p. 93.

no tacit hypothec so as to entitle the purchaser to the things or land bought from the seller in case of the latter's insolvency, nor to a preference on the assets of the insolvent estate for the purchase money paid. So long as the seller is not insolvent he can be sued to make delivery, but where no delivery has been made, inasmuch as the *dominium* or the *jus in re* in the land or goods sold is still in the seller, this right passes to his trustee on insolvency, and the purchaser can only prove on the estate as a concurrent creditor for the purchase price paid. In many instances this has worked great hardship, but the purchaser has it in his power to refuse payment till delivery is made. If then, in good faith or by agreement, he pays without delivery, he has only himself to blame if he cannot claim what he has bought, owing to the seller's subsequent insolvency. The delivery of goods may be symbolical, but the delivery of landed property can be done only by passing transfer thereof in the Deeds Registry Office. But when a thing is bought, whether movable or immovable, from a person who himself had never received delivery then, on his insolvency, whether it was paid for or not, his trustee would be bound to procure it and make delivery thereof to the purchaser.[1]

LEASES AND SERVITUDES.

A lease is not a movable, nor is it an immovable. It is a special right, and cannot be made to the detriment of a prior hypothec, whether tacit or conventional. It is for this reason that, when a lease is made subsequent to the hypothec, the property in insolvency must first be put up for sale subject to the lease, and if it does not cover the hypothec it must be put up for sale, and sold without the lease. But, if the lease was on the property before the hypothecs, the property must be sold subject to the lease. The insolvency of the lessee cancels the lease so far as he is concerned, but his trustee may take it over if he pleases;[2] but though a

[1] *Harris' Trustee* vs. *Buissinné*; *Van Aardt* vs. *Hartley's Trustee*, 2 M. 105 and 135; *Preston & Dixon* vs. *Biden's Trustee*, 1 A., 322; and *Goosen* vs. *Goosen's Trustee*, Ibid, 414.

[2] § 104, Insol. Ord.

lease is cancelled by the insolvency of the lessee, the sureties are still liable for the future rent.[1] The insolvency of the lessor, however, does not cancel the lease, which can still be enforced by the lessee. The arrear rent till the sale must be paid to the trustee, and the future rent, from the moment of sale, must be paid to the purchaser, unless the conditions of sale vary this, or the parties specifically agree to the contrary. A lease made in fraud of creditors is void *ab initio;* and a lease made absurdly low in rent may be set aside, or the rent be increased, if there is reasonable evidence of collusion. A lease of landed property for 25 years and upwards must be registered with the transfer of the property, to be effectual. Town lands can be sublet without the consent of the lessor, but not country property, except where there is a written contract to the contrary.[2]

An agreement purporting to be a lease of the stock by A to T, where the identical stock need not be returned, but other of the same description, at a yearly rent, the property in the stock passes to T, and consequently belongs to T's trustee.[3] The usual *sheep lease* in vogue in this Colony gives the lessor no preference in insolvency. The point to be looked at is this. If the same sheep as are let, or as many thereof as survive, are to be returned to the lessor at the expiration of the lease, then, on the insolvency of the lessee, the sheep would not go to his estate on the ground that the lessor has never parted with his *jus in re* in the sheep; but if other sheep are to be returned in the place of those let, then the *dominium* or *jus in re* in the sheep immediately vests in the lessee, and on his insolvency belongs to his estate. This rule applies not only to the lease of sheep but to other animals as well. Thus, where ostriches had been leased on half-profits, and the birds were to be returned to the lessor after the expiration of the lease, the lessor never lost his *dominium*,

[1] *Beaufort West Municipality* vs. *Krommeck's Trustee and others*, 5 J. 5.

[2] *Haupt's Trustees* vs. *Haupt & Co.*, 1 S., 287; *Swartz* vs. *Landmark*, 2 J., 5; *De Vries* vs. *Alexander*, 1 F., 43; *Patterson's Executors* vs. *Webster, Steel & Co.*, 1 J., 350; *Albertyn and another* vs. *Van der Westhuysen and others*, 5 J., 385; *Green* vs. *Griffiths*, 4 J., 346; Van der Keessel, 673; *Dryer's Trustee* vs. *Lutley*, 3 J., 59.

[3] *Tucker* vs. *Austin's Trustees*, B., 1868, p. 145.

and could claim the birds back from the insolvent estate of the lessee.[1]

A pledge of his interest in a lease by one of the co-lessees, without delivery of the subject-matter leased, does not entitle the pledgee to the interest, in insolvency, on the ground of the want of the *jus in re*, which belongs to the pledgor, and consequently to his estate, should he (the pledgor) become insolvent.[2] On the same principle, an assignment of a lease is not complete as such unless it has the effect of substituting the assignee as tenant in lieu of the original lessee; in other words, of transferring the lessee's contractual obligations towards the lessor from the lessee to the assignee.[3]

A lessee's right to growing crops is preferent during the existence of the lease, upon the lessor's insolvency, to a bond by the lessor prior to the lease, because, as the land was mortgaged without the crops, the mortgagee's security was not prejudiced. This differs from where a lease may be set aside as injurious to the bond.[4]

Movable shelvings that may have been put up by the tenant, though kept in position by means of holdfasts driven into the walls, belong to the tenant, and on his insolvency, to his estate, and the lessor cannot, upon the termination of the lease, retain the shelving as his property.[5]

As a lease cannot be to the detriment of a prior hypothec, so also is it with a servitude. A servitude can neither be created nor be done away with to the detriment of a prior mortgagee or a prior hypothec. The rule is *Qualitatis autem additio vel detractio in jure hypothecæ nihil mutat.*[6]

PLEDGES.

A pledge means a thing pledged by the simple delivery of it to the creditor as security for his debt without conveying the ownership in it to him.

No particular form is necessary, nor need it be in writing,

[1] *Van der Hoeven* vs. *Trustee De Wet*, B., 1879, p. 127.
[2] *De Pass* vs. *Colonial Government and others*, 4 J., 383.
[3] *Green* vs. *Griffiths*, 4 J., 346.
[4] *Albertyn and another* vs. *Van der Westhuysen and others*, 5 J., 385.
[5] *Abrahams* vs. *Isaacs*, 5 J., 183.
[6] 3 Hol. Con., 216.

though it is best to have it in writing, however few words, so as to avoid doubts and disputes, and to make it easier of proof.

A pledge may be of every kind of movable, or of debts, which are *in commercio.* Things which are not subject to purchase and sale cannot be pledged.

The pledgee is bound to take good care of the pledge, as he is responsible for all damage or accidents. If he destroys it he must make it good; if he misuses it he can be compelled to give security. He is liable for all faults of his, or of his servants; and, when his debt is paid, he must restore the thing pledged in certainly no worse state than it was when he received it.[1] But the pledge need not be restored until the whole debt is paid, though the pledgor offers another or better security.[2]

A pledgor fraudulently removing anything pledged by him and delivered to the creditor is guilty of theft.[3]

If a flock of sheep is pledged, it includes the lambs to be born, for all the fruits and other accessories arising from the pledge are bound, although they are not specifically mentioned. So, also, if goods in a shop are pledged, and the owner has from time to time sold and brought in others, all the goods found in the shop afterwards are subject to the pledge. The creditor cannot sell the subject-matter of the pledge without the consent of the pledgee, unless he is authorised to do so by the pledge itself, or has a judgment of the Court to that effect.[4]

Goods already pledged to one person may be also pledged to another, but the first pledgee should retain possession thereof till he is paid, when it is the duty of the second to get them.[5]

A pledge, though executed before a Notary, if unaccompanied by delivery, is in no better position than a notarial general bond, and therefore, to be effectual in insolvency as a

[1] Just. Inst., 3, 14, 4; Peckius on Arrests, chap. 44, § 5; Loenius, 81.

[2] Hub. Hed. Regts., vol. 1, p. 552, n. 5; Peckius, p. 567.

[3] *Heydenrych* vs. *Saber and others,* 10 C. T., 129.

[4] 1 Berg, Ned. Adv., 179; and 4 Ibid, 174; Grotius, 3, 8, §§ 7–15; Neostadius, Dec. 89 and 110; Zutphen's Prac., Tit. "Compact," n. 9; *Wilson* vs. *Shaw,* 1 C.T., 299.

[5] Van Leeuwen, 4, 13, 6.

general bond, must be duly registered in the Deeds Registry Office, the only exceptions being as to a pledge of shares and a pledge of a mortgage bond. But a pledge need not be notarially constituted, but whether notarial or not, if *duly delivered to and retained by the pledgee* need not be registered in the Deeds Registry Office. If there is *no delivery and retention* of the things pledged, the pledgor may afterwards pledge them to someone else, or sell, or alienate them in some other way, and the alienations, for valuable consideration, to a *bonâ fide* alienee cannot be challenged, and the former pledgee will not be able to follow them up or to get them back, as he never had the *jus in re* in them. As long as they are still in the possession of the pledgor the pledgee may sue for their delivery, so as to complete the pledge, but he should do so within a reasonable time. Generally the delivery should be made simultaneously with, or before the execution of the pledge; and if this from circumstances should be impossible then within as reasonable a time as possible. But active steps should be taken and no time should be lost to get delivery. The pledgor has similar rights against the pledgee to compel him to fulfil his part of the obligations and even to prevent delivery if necessary to the fulfilment of the pledge.[1]

Pledges should not be confused with liens. A lien takes place by operation of law, a pledge by agreement. In this respect a lien is in the same position as a tacit hypothec; but a lien differs from a tacit hypothec in that it attaches only on some specific thing in the creditor's possession, and the creditor's claim is preferent on that thing only, whereas a tacit hypothec is general on all the goods of the debtor. Examples of liens are given in the Chapter on "*Proofs of Debt*," and hereinbefore under the letter "*n. Attorneys*," &c., while the tacit hypothec has also been fully explained above. A lien or a tacit hypothec is continuous, whether insolvency supervenes or not.

[1] 3 Hol. Con., 98 and 174, n. 3; 1 do., 247 and 246; 4 Ibid, 178, 189, and 413; 5 do., 249; Loenius, 42 and 80; Neostadius, 89 and 110; 2 Berg., Ned. Adv., 100 and 224; 3 Ibid, 19, 156, and 201; *Discount Bank* vs. *Dawes*, 1 M., 380; and *Woutersen's Executors* vs. *Palmer and another*, Ibid, 417. See also further "B. *Conventional Hypothecs*."

PLEDGE OF SHARES.

By the law of Holland, and also formerly with us, a pledge of shares had to be done notarially, and to be registered in the Deeds Registry Office, to give preference; but now, by Ord. 13 of 1846, a share may be lawfully pledged and a preference therein created as against the pledgor and his creditors, by its being delivered to and detained by the pledgee, and by having an endorsement thereon, or by a separate deed of such pledge. Such a pledge does not abridge, nor alter, the *jus retentionis* of the pledgee for any future debt not contemplated by him.[1]

PLEDGE OF BONDS.

Though, as a rule, a pledge unaccompanied by delivery must be registered to give it a preference as a general bond, yet a pledge of a mortgage bond which has been duly passed and registered need not be registered. The party in whose favour the bond is pledged is bound to take the same care as the original hypothecee or pledgee of the things pledged, and of which delivery was made to him, and he can be held liable for any negligence, or dilatoriness, as to the goods or as to the sureties to the bond. Such a pledge can apply only to the debt contemplated by it, and not in respect of any other debt due by the pledgor to the pledgee.[2]

PLEDGE OF TRANSFER.

The transfer of landed property cannot be pledged, and if any pledge is attempted it creates no lien or preference.[3] The transfer must be given up to the trustee.[4]

[1] § 2 of said Ord.; see also *Brink's Trustees* vs. *South African Bank*, 2 M., 381.

[2] *Sutherland* vs. *Elliott Brothers*, 2 M., 349; and *Brink's Trustees* vs. *South African Bank*, Ibid, 381.

[3] Discussed in *Phillips and King* vs. *Trustee Norton*, 2 M., 369; *Trustee of Randall* vs. *Norden*, Ibid, 368.

[4] See remarks under letter *n* hereinbefore, under heading "*Attorneys*," &c.

B.—Conventional Hypothecs.

A conventional hypothec is an obligation, or a bond, of a debtor, in pursuance of an agreement between him and his creditor, to give the latter security for a debt.

This security may either be of movables or of immovables, or of both, and may also be either general or special, or both. When of immovable property, it is called a Hypothecation, or a Mortgage Bond: when of movable property, it is called a Pledge, though some ancient writers called it by either or both names. Though a mortgage bond in itself is called a movable asset for the purpose of cession, transfer and delivery, yet the land it hypothecates is called immovable, and therefore it is called a mortgage of immovables.

In mortgaging ground, a farm, or an erf, it is the land that is mortgaged, not the buildings thereon; one cannot separately mortgage the land to one person and the buildings thereon to another, or mortgage the buildings alone. A ship of over four lasts is said to be an immovable, and in mortgaging the keel of a ship all the superstructure, the masts and tackle, go with it.[1]

In the mortgaging of land, all immovables, present and future, attaching to the land are included under the first bond. It is for this reason that buildings erected on land subsequent to a mortage on that land, and which buildings were specially hypothecated by a bond, did not come under the latter but under the former bond.[2]

The owner of a burnt-down house cannot be compelled to rebuild it, so as to keep the mortgagee's security at its original or hypothecated value. Hence buildings on land, if of more value than the land itself, are generally insured, and the fire policy is ceded to the mortgagee as a collateral security.[3]

The interest on a bond is preferent for a year and a

[1] 1 Hol. Con., 316 and 317; and by analogy, *Leibrandt and Geyer* vs. *Dickenson and Burnies*, 2 M., 341.

[2] Consult *Oberholster* vs. *Holtman*, 2 M., 346.

[3] Consult 3 Hol. Con., 129, N.S., 1 and 2; and Loenius, 33.

current year.[1] The pledge of movables may be included in a mortgage bond, but if movables only are to be pledged, then a notarial bond is passed. If no specific movables are pledged in a mortgage bond, but only a general reference is made to "movables" to "all property present and future," then this clause in the bond is called the "general clause."

If no movables are specifically mentioned in a notarial bond, it is called a "notarial general bond." The "general clause" in a mortgage bond has the same effect as a "notarial general bond," and *vice versâ*. It is usual to insert the general clause in a mortgage bond, but it may be specially omitted, according to agreement: if not inserted, it is not implied.

Notarial general bonds are passed where there is either no landed property to be secured, or it is already fully mortgaged; or when the debtor does not wish to pledge his movables, or has no movables to pledge, but depends only upon future property. Therefore such bonds are of use only if at the time of sequestration of the pledgor's estate there are assets in the estate not specially mortgaged or pledged, or, if so, there is an available balance after satisfying such special mortgages or pledges. The person who passes the mortgage bond is called the mortgagor; the person in whose favour it is passed is called the mortgagee. The person who passes the notarial bond is called the pledgor; the person in whose favour it is passed is called the pledgee. So also in underhand pledges the parties are respectively called the pledgor and pledgee. Landed property cannot be pledged or hypothecated in a notarial bond. It can be hypothecated only before the Registrar of Deeds, though formerly it could be done *coram judice*.[2]

A notarial general bond, or the general clause in a mortgage bond, applies to all present and future property the mortgagor or pledgor may become entitled to, from whatever source, whether inheritance or gifts, and whether movable or immovable, and wheresoever it may be, in the country where the bond is passed;[3] for the bond, mortgage or

[1] See remarks in Chapter on "*Proof of Debt*;" and *Cloete* vs. *Aling*, 2 M., 318.

[2] See also *Executors of McKenny* vs. *Rorke*, 2 M., 366.

[3] *Cloete* vs. *Colonial Government*, 2 M., 325, and *Smit* vs. *Jurgens*, Ibid, 329.

notarial, has no preference on, and cannot hypothecate, property which does not come within the jurisdiction of the Supreme Court of that country. Such a bond, to be enforced in a country where it has no preference, only serves as evidence of the acknowledgment of the debt by the mortgagor to the mortgagee, or pledgor to the pledgee, and would in that country rank concurrently with other acknowledgments of debt. The Placaat of the 10th May, 1529,[1] specifically enacted that "bonds of immovable property must be effected before the Judge of the place where the property is situated." This Placaat was subsequently interpreted by another dated 1st April, 1580,[2] to the effect—

"that the claim of the general hypothec, besides the claim of the special hypothec in any bond, ... shall take effect only, according to the written law, over the goods in the jurisdiction of the Judge, and not on the goods without the jurisdiction."

It will be noticed that neither of these Placaaten refers to "movable" property, but only to "immovable." We therefore, as to the movables, still follow the Roman law, which has been adopted by the Dutch law. But the tax imposed by these Placaaten, and by the Placaat of the 9th May, 1744,[3] is not in force with us, as taxation measures do not follow in the colonies; besides, we have our own systems of taxation.[4]

The rule already given in tacit hypothecations, *qui prior est tempore potior est jure*, applies equally to conventional hypothecations, and to notarial bonds and pledges also; and the authorities quoted above on that point are applicable here. Therefore, of two or more notarial general bonds, they rank preferently in the order of date, just as of two or more general clauses in several mortgage bonds they also rank preferently in the order of the dates of the bonds. Again, between a notarial general bond and a general clause in a mortgage bond, the preference lies according to the order in which they were passed and registered.

A bond may be passed for debts not yet, or to be, incurred,

[1] Placaat Boek, Vol. 1, p. 374.
[2] Placaat Boek, Vol. 1, p. 338, § 35.
[3] Vol. 7, p. 1445, § 21.
[4] See also Placaaten of 8th March, 1594, Placaat Boek, Vol. 2, p. 2212; and Placaat of 9th August, 1780, Placaat Boek, Vol. 9, p. 554; Schorer, §§ 255, 258 and 262; and Grotius, 2, 48, 28.

but it cannot give *jus prioritatis* until the debt has actually been incurred, from which date or dates only the preference begins.[1] For instance, take the case of what is commonly called the "ordinary covering bond." The accounts between the parties should show what is due from time to time, and the dates on which the various transactions took place. The bond should be for a *maximum* sum for the purpose of registration, but the mortgagee is always liable to prove what is due to him, and from when. The object of such a bond is only to secure a preference on a running account. For instance, if the mortgagor, or pledgor, has from time to time sold goods in a shop and brought in others, all the goods found in the shop afterwards are subject to the bond. Such a covering bond cannot be ceded, however, independently of some debt covered by it, and no cession could make it effectual as a security for any debt not owing by the mortgagor to the original mortgagee at the date of the cession.[2]

Among themselves, mortgage bonds on the same property also rank in the order of date in which they were passed. But in case two or more mortgage bonds are passed on the same day on the property, and it is not stated which shall be first, second, or third, and so on, then the rule is that they shall rank in the order in which they were registered; for the presumption is that in that order they were meant to be, in the absence of any proof to the contrary. If the registration should be of such a nature as to make it doubtful in which order they were registered, or which was meant to be first, second, and so on, then they rank *pro rata*.[3]

But evidence may rebut the legal presumption, and so the Court found in the case of *Tredgold's Executors* vs. *Colonial Orphan Chamber*.[4] The like rules apply if, by a notarial special bond, the same things are pledged as are pledged in the special clause of a mortgage bond, or as are specially pledged by another notarial bond; and they apply also to all other hypothecations or pledges, whether special or general.

[1] 1 Hol. Con., 291, and 4 Ibid, 234.

[2] Consult also *Leibrandt and Geyer* vs. *Dickenson and Burnies*, 2 M., 335.

[3] Zande, 3, 12, 17; 3 Ned. Adv. 9; and Kersteman, Tit. "Hypotheek;" 1 Hol. Con., 225; and Ibid, 247.

[4] 6 J., 358.

But the *special pledge of movables*, whether in the mortgage bond, or by a notarial special bond, or by an underhand deed, *must be accompanied by the delivery of the things pledged to the pledgee, and be retained by him.* For unless there is this *delivery and retention*, the special pledge is in no better or worse position than a notarial general bond, or a general clause in a mortgage bond, since delivery without retention, or the loss of the retention, or the waiving of it, is tantamount to no delivery; and in such a case the prior general hypothec would be preferent to the subsequent special hypothec of movables not followed with possession. And whether the bond is of movables or of immovables, the bond on movables, or thing specially pledged, is considered as pledged in full, *in solidum*, to the creditor who holds the first mortgage or pledge, and his hypothec, so far as he is concerned, is continuous and indivisible, *quod hypotheca sit individua.*[1] It is no use resorting to a sham sale or a sham lease in such matters, and allowing the articles to remain with the debtor, to be claimed only when he becomes insolvent. If a sale or lease is alleged, the Court must enquire into the *bona fides* of it, and if they find the transaction a colourable one, they must set it aside; or, in the language of the Court in the case of *Guest* vs. *Le Roux's Trustee*,[2] "We must look at the real substance of the transactions, and not at the fictitious forms which the parties have adopted for certain purposes." A *bonâ fide* sale upon a suspensive condition is good, but one upon a resolutive condition is void, as against creditors.

The reason why a later pledge of movables, accompanied by delivery, is preferent to a prior general hypothec is because of the absolute certainty that the goods were in existence at the time of the pledge; whereas when the general hypothec was passed the presumption was that there were either no goods specially to pledge, or the parties agreed to forego such a special pledge. It is a common practice to release a portion or the whole of landed property from the operation of a mortgage bond, when the

[1] 2 Hol. Con., and 4 Hol. Con., 11 and 240; *Sequestrator* vs. *Thomson and another*, 1 M., 479; *Blanckenberg* vs. *Guardians of Lond*, Ibid, 483.

[2] 5 J., 119.

mortgagee is satisfied that his remaining security, or the general clause in the bond, is sufficient security. Such release does not discharge the operation of the general clause of the bond.[1]

The sum total of all these general rules may be briefly stated thus:—

a. That a prior tacit hypothec is preferent to a later special conventional mortgage or pledge.

b. That a later special mortgage, or special pledge, is preferent to an earlier general mortgage or general pledge.

c. That an earlier general bond is preferent to a later special pledge unaccompanied by delivery.

d. That two or more general mortgages rank in the order of date.

e. So also do two or more special mortgages or pledges.

f. That in one or more tacit hypothecs, and one or more special conventional hypothecs or special pledges, regard is also had to the order of date.

g. That general mortgages rank before unsecured debts; and

h. That *kusting brieven* for land *bonâ fide* bought and sold, and paid for and *passed pari passu with the transfer*, are preferent to all the tacit hypothecs here mentioned, irrespective of their dates, excepting, of course, death-bed expenses.

Van der Linden[2] mentions that the "general mortgage . . . extends to all the property, wherever situate . . . ." This does not mean in whatever part of the world it is situate, but wherever situate within the jurisdiction of the highest Court of the land in which the bond was passed; *coram lege loci.*[3] He also states on same page that "the posterior notarial mortgage ranks before the prior underhand mortgage." Of course we have no underhand mortgage in this Colony, in the legal sense of that term. Whatever document may be called such by laymen is not known in law, and is not entitled to any preference whatever. Nor have we what is called in England "the doctrine of equitable

[1] *Watermeyer* vs. *Heckroodt and another*, 1 M., 477.

[2] Juta's Tr., p. 96.

[3] 2 Hol. Con., 123 and 130.

mortgage," nor the sham pledge or mortgage which in England goes under the name of a "bill of sale."

The proceeds of the land specially mortgaged, or the movable goods specially pledged, must, after deduction of the usual and reasonable expenses of administration and realisation thereof, be awarded to the mortgagee, or pledgee, to the extent of their preferent claims, in the order of the hypothec or pledge vested. The balance should go to the general estate of the insolvent. If the special hypothecs or pledges do not also include the general clause of hypothec, the deficiency can be ranked only concurrently on the estate; if they do include the general clause, they rank preferently on the general assets of the estate not specially pledged, in the order of time of their vesting. *Quitrent* being a tacit hypothec on the land before the mortgagor obtained title, or being one of the conditions of his title-deed, *is preferent to the extent of three years to any other hypothec on the property*, tacit or conventional; but it is not preferent on the other landed property, nor on any movable property of the insolvent, as *it is preferent only on the land on which it is imposed.*

A conventional or special hypothec ceases,

a. By merger.

b. By a voluntary release on the part of the creditor.

c. By accepting other security in lieu.

d. By prescription of 30 or 40 years—30 years if the hypothec is in the hands of a third party, and 40 years if in the hands of the debtor or his heirs; but any payment on account, however little—though only a farthing—whether of interest or of capital, interrupts the prescription.[1]

e. By payment.

f. By other acquittances, or novation.

How and when the tacit hypothec of a person ceases has been mentioned hereinbefore; and in addition thereto, if a person of full age has a tacit hypothec, and afterwards takes a conventional mortgage for the same thing, he must be presumed to have novated his claim, and he will be held to

[1] Grotius, 2, 48, §§ 48, 60 and 61; Neostadius, Dec. 8, in Fine, and 1 Hol. Con., 264; *Executors of Schonnberg* vs. *Executors of Vos*, 1 J., 325.

have abandoned his tacit hypothec. Such a bond, in lieu of his tacit hypothec, must be treated like any other bond, and is challengeable or not, for the same reasons as any other bond. But of course, as stated elsewhere in this chapter, a minor cannot, by deed of Kinderbewys, be deprived of his tacit hypothec.[1]

When a debtor has undertaken to pass or grant a hypothec or bond he can be compelled thereto.

Having mastered these general principles, the student should endeavour to apply them in practice by working out, for example, a case like the following, and until he can satisfactorily do so he should continually read, and re-read, this chapter.

Case put.

By their will A and B bequeath to their daughter, C, the farm "Lovedale," with this condition :—"No future husband which our daughter may marry shall have any right whatever to, or in any way use, this farm."

By the will of her uncle, E, she received as a legacy, unconditionally, the farm "Dassiesgat," and 3,000 sheep. She also received the farm "Draainek," but on condition that after her death it should go to her heirs *ab intestato*, but any husband she might marry to have the usufruct thereof during the minority of such heirs.

After the death of A, B, and E, C married F.

They entered into an ante-nuptial contract, stipulating that they marry *out* of community of property as to the farm "Dassiesgat," but *in* community as to the rest of their estates, present and future.

On the 14th August, 1847, they were married.

On the 3rd July, 1850, F mortgaged his farm "Pampoenkraal," for £2,500, to G. This bond contained the usual general clause.

On the 9th December, 1851, he passed a notarial general bond for £1,200, to H.

On the 4th March, 1852, he passed a mortgage bond on his farm "Poespasvlei," for £3,000, to I, which bond did not contain the general clause.

On the 11th December, 1853, he passed a notarial bond for £800 to J, pledging 40 leaguers of brandy, and made delivery thereof; bond contained general clause.

On the 19th May, 1854, he passed a notarial bond for £1,000 to K, pledging 3,000 sheep, but made no delivery of them. This bond contained no general clause.

[1] Consult also *Lutgen's Heirs* vs. *Trustees and Curator of Lutgen*, 2 M., 312.

On the 20th December, 1859, he bought the farm "Krakeel Rivier," for £3,000 from L, and on getting transfer, he passed at the same time a kusting brief for £2,000, and gave his promissory note for the remaining £1,000, and by way of security for the latter sum he delivered 10 ox-wagons with gear complete.

On the 1st May, 1863, he gave to K, by an underhand document, 5 spans of mules, in further security in lieu of the 3,000 sheep for the £1,000 bond of May, 1854.

On the 1st December, 1865, he hired for 10 years 20,000 sheep from M, at 1s. 6d. per head, per year, and undertook at the end of the lease to replace them by sheep of the same age and kind, failing which, to pay 10s. 6d. per sheep for those which he could not so replace.

On the 1st July, 1866, he let to N 50 ostriches, 50 cows, and 2 bulls, for 10 years, at £2 per annum per ostrich, 30s. per annum per cow, and £20 per annum per bull; and N undertook to replace them at end of lease by animals of same kind and quality, failing which, to pay for each ostrich £20, for each cow £15, for each bull £75.

On the 1st December, 1867, he leased his farm "Poespasvlei," to O, for 20 years, at £300 per year, without the consent of the mortgagee.

On the 1st August, 1868, he became executor of the estate of P, who died worth £7,500, and left 3 children, aged respectively at this date 3, 9, and 12 years.

On the 1st December, 1869, he became the guardian of the 5 minor children of Q, whose estate was worth £11,000, of which he was co-executor with Z, and took out Letters of Tutorship. At this date the children were respectively 13, 15, 17, 19, and 20 years old.

On the 1st March, 1871, he hired from Government 5 quitrent farms, on the 21 years' lease system, at £75 a year for each farm.

On the 10th May, 1872, he created a servitude on the farm "Krakeel Rivier," by which, for the sum of £750, he sold all his water-rights on the farm to the Company R; and he took a share in that Company for £250 as part of the purchase price. No notice of this was given to the mortgagee.

On the 11th July, 1872, he sold his farm "Langlaagte," to S, for £5,000, and he had to keep the farm for his own use for 18 months longer, when he was to give transfer, and receive balance of purchase money.

On the 18th August, 1872, one of his children died.

On the 19th September, 1873, his wife died intestate.

At the date of her death there were children of the marriage, a, b, c, d, e, f, g, h, and i, aged respectively, 27, 26, 25, 20, 18, 17, 15, 14, and 11; a, d, and g were married.

On the 1st November, 1873, he took out Letters of Administration of his wife's estate, as executor dative, but took out no Letters of Tutorship.

On the 1st March, 1874, he passed a second mortgage on the farm "Poespasvlei," for £1,150, to T, containing also the usual general clause.

On the 1st April, 1874, he filed an account, with the Master, of his wife's estate, by which he made it appear that the balance for distribution

to the children amounted together to £864; but did not pay this over to the Master.

On the 1st June, 1874, he was in England, and there married U, without making a marriage settlement, and passed no kinderbewys.

On his return on the 11th May, 1875, he was sued by his son-in-law, who married g, for an amendment of the liquidation account; and after enquiry the Court, on the 15th December, 1875, ordered the account to be amended by awarding to each child the sum of £355. The money was not paid.

On the 3rd April, 1875, his second wife gave birth to a child, j. She was ill a long time, and the doctor's account amounted to £105, and the apothecary's to £47, while the special consultations of the doctors amounted to 30 guineas. She died on the 30th January, 1876.

On the 10th May, 1876, he went to Europe, and there underwent an operation which cost him £100. On his return to the Colony he was attended for some months, for the same cause of complaint, by two medical men, whose joint account amounted to £97 10s.

On the 1st December, 1877, he gave his cart to V, to repair, which repair cost £17, but V retained it.

On the 11th December, 1877, he met with an accident, was attended twice a day by three medical men, for 11 days, when he died; for this attendance they claimed each a guinea for each visit. The apothecary's account amounted to £5 4s. 4d.

On the 21st December, 1877, he was buried. W was the undertaker. As the deceased was reputed to be rich, he, W, prevailed upon the children to have a funeral worthy of their father's wealth. His funeral charges, with coffin, came to £66 10s.

On the 29th December, 1877, the executors of his estate were appointed. On calling in the claims they found the estate to be insolvent, and accordingly surrendered it.

All the assets of his estate were sold; "Pampoenkraal" was sold for £4,000, "Poespasvlei" was sold for £2,575.

The 40 leaguers of brandy were long before taken over by J for the sum of £500, the balance remaining unpaid.

K had previously taken over the mules for £800; balance still due.

"Krakeel Rivier" realised £7,500.

N failed in his lease, and was sued for the value of the animals, but offered a compromise of 2s. 6d. in the £, which was accepted by the tustees of F.

The insolvent had not liquidated P's estate, nor Q's.

He owed the Government quitrent for 6 years on his 5 quitrent farms leased; and 7 years quitrent at £5 per annum on each of his other farms.

In addition he owed his attorney £37 10s., for the transfers and mortgages passed, but the attorney had delivered up to him these papers. He owed the Church for pew-rent £7 10s. He owed the Municipality £98 for taxes. He owed the Government £20 for house duty. He owed the Registrar of the Supreme Court £25, for a fine inflicted for not answering a subpœna when called. He owed the Government Post

Office £100 for stamps. He owed the Divisional Council £72 for taxes. He owed the Church £32 10s. for collections received at the door. He owed 72 other creditors not heretofore mentioned, on open accounts, £7,000, and on promissory notes £11,400.

The trustees refused to confirm the sale of "Langlaagte," and sold it for £8,000. The cart which was repaired by V was sold for £66. The rest of his movable estate was sold for £3,373, and two erven in a village, but unmortgaged, were sold for £445.

Answers required:—

1st. How would you frame the liquidation and distribution account of F's insolvent estate?

2nd. The creditors claimed that the farm "Lovedale," valued at £3,000, "Dassiesgat," valued at £4,000, and "Draainek," valued at £1,775, should be sold for the benefit of F's estate; and that the produce, or usufruct, of the 3,000 sheep C inherited should be accounted for, and be brought up in F's estate.

If you hold that all, or some, of these claims should form part of his estate, then show the liquidation and distribution of them also in the above account. But if you hold they do not, then *who* should administer them, and to whom should they go?

CHAPTER XXXIV.

VOLUNTARY SURRENDER.

ANY person who wishes voluntarily to surrender his estate as insolvent must do so by a petition to the Court, or a Judge, setting forth that he is insolvent, and is desirous of surrendering his estate for the benefit of his creditors. He must in addition thereto produce proof of his insolvency, to the satisfaction of the Judge, who may either have him examined touching his insolvency, or require an affidavit from him as to the facts; and the Judge, in his discretion, may either accept or refuse the surrender.[1] But instead of an examination of the petitioner or an affidavit from him, it has become customary for the petitioner to annex to his petition, and for the Judge to receive, a statement or schedule of the affairs or position of his estate. These schedules, however, do not do away with the power of the Judge to require in addition thereto such facts on affidavit, or by examination, as he may deem necessary, either for the purpose of explanation or confirmation, regarding the affairs of the insolvent.

Though it has become the practice for schedules to be lodged with the petition, yet the Court or Judge may accept the surrender of the estate without such statement or schedules, if satisfied that for want of information or for whatever other cause they cannot be properly made; as, for instance, if a surviving spouse has no knowledge of her late husband's affairs, conduct, or management of the joint estate; or if an executor can give no definite information as to the estate he represents; or if a partner can give no information

[1] § 2, Insol. Ord.

as to his deceased or absconded partner's management of the partnership business.[1]

The form of the petition given at the end hereof, and the specimen schedules subjoined thereto, though not required by law, were framed by the late Mr. Justice Burton under the old Insolvent Ordinance,[2] and have been ever since received and acted upon by successive Judges, and may now be said to have become law by custom.

An agent, duly authorized to administer the estate of a person absent from the Colony, may surrender such estate as insolvent:[3] and so also may an executor of an estate, or any curator, surrender the estate he represents.[4] But in the case of a partnership or a company, one partner cannot surrender it in opposition to the wishes of the other or others, but the greater number of partners, who at the time of presenting the petition are in the Colony, may surrender the business.[5]

No person not yet rehabilitated can surrender his estate as insolvent for the second or further time, until proof be shewn to the Court, or Judge, that the accounts of the liquidation and distribution of his previous surrender have been confirmed.[6] Nor, for the same reason, can a compulsory sequestration be granted.[7]

Before an estate can now be surrendered as insolvent, the petitioner must give at least ten days' notice in the *Gazette* of his intention to apply to a Judge, on a day therein named, for the surrender of his estate, and must lodge his schedule, for the inspection of creditors, at the office of the Magistrate in whose district he resides, for a period of not less than seven days from a date to be named in the notice;[8] and as proof thereof to the Judge he must file the *Gazette* containing the notice, and the Magistrate's certificate that the schedules have lain at his office for inspection during the period named.

The surrender of an estate may be opposed by any

[1] *Re Meiring*, B. for 1868, p. 12.
[2] No. 64 of 1829.
[3] § 2.
[4] § 3.
[5] § 3.
[6] § 128; see also *re Est. Buyskes* in 1881 and *Ford* in 1885, neither of which is reported.
[7] *Alford and Wills* vs. *Townsend*, 4 J., 153.
[8] § 1, Act 38 of 1884; *re Mehliss*, 5 E.D.C., 234.

creditor however small his claim. The opposition may be in person, or by *vivâ voce* examination, but is usually by an affidavit which sets forth the grounds of objection.

There is no hard-and-fast rule serving as a guide for the acceptance or refusal of an estate as insolvent. Generally, the Court or Judge looks to which course will more especially be to the benefit, or in the interest of, the general body of the creditors of the estate. Thus, where it appeared that a mortgage creditor would be delayed in obtaining satisfaction of his judgment, the Court refused the surrender, because the creditors would derive no benefit from it.[1]

On the other hand, there are several instances where, for judgment debts of people who were in gaol, the Court has accepted the surrender of their estates, however small, on the ascertained ground that no further blame was attachable to them beyond their inability to pay, though the creditors could derive no benefit thereby.

But when an imprisoned debtor surrenders his estate as insolvent, he is not necessarily released from gaol. He can be discharged only at the discretion, and upon an order, of a Judge, after due notice of the application for his discharge to the detaining creditor.[2]

By a notice of the Supreme Court of the 2nd October, 1860,[3] application for the voluntary surrender of an estate must be made either by the petitioner in person, or by an attorney on his behalf. And by a notice of the 27th of November, 1860,[4] all such petitions must be lodged with the Registrar before presentation to the Judge. Also by a notice of the 20th of October, 1885,[5] no application for a voluntary surrender can be entertained, unless made within a *reasonable time* after the notice of intention to surrender has been published. In practice this "*reasonable time*" has been construed into not later than the day after the expiration of the notice.

But though a notice in the *Gazette* of a person's intention to surrender stops all legal proceedings against him, it is still

[1] *Re Steenkamp*, B. for 1875, p. 44.
[2] § 22, Insol. Ord. and *re Schenk*, B. for 1876, p. 8.
[3] Tennant's Rules of Court, 3rd ed., p. 221.
[4] Ibid.
[5] Ibid, p. 222.

in the power of any Judge, upon good cause shewn, such as that the debtor is not acting *bonâ fide*, to order the execution of any judgment obtained before such notice appeared.[1]

A debtor's notice in the *Gazette* of his intention to voluntarily surrender his estate does not bar the Court from placing the estate under compulsory sequestration.[2]

Notice for Gazette of intention to surrender.

Notice is hereby given that . . . . of . . . . intends applying to one of the Judges of the Supreme Court of this Colony, at Cape Town, on . . . . the . . . . day of . . . . for leave to surrender his estate as insolvent; and that prior to such application a statement of his affairs will lie for inspection of creditors at the office of the Resident Magistrate of . . . . for a period of seven days, calculated from the . . . . day of . . . .

Dated at Cape Town, this . . . . day of 19

. . . . . .

Applicant's Attorney.

Petition to surrender.

To the Honourable the Chief Justice of the Colony of the Cape of Good Hope, and the Judges of the Supreme Court of the said Colony.

The petition of . . . .

Sheweth :—

That your petitioner, by misfortune, and without fraud or dishonesty, on . . . . part, hath become, and is, insolvent,—wherefore . . . . is desirous of surrendering . . . . estate for the benefit of . . . . creditors, according to law,—and hereby surrenders . . . . estate, and prays that the same may be accepted and placed under sequestration.

And in proof of the matter aforesaid, your petitioner has annexed hereunto a true statement, on oath, of . . . . whole estate and effects, and the debts, claims, and liabilities affecting the same, to the best of . . . . knowledge and belief; as also the affidavit of . . . . being impartial appraiser of the said estate.

Dated at . . . . this . . . . day of . . . . in the year of our Lord one thousand nine hundred and . . . .

[1] § 2 of Act 38 of 1884, and § 11 of Act 17 of 1886; *Nelson & Co.* vs. *Whiting*, 4 E.D.C., 322.

[2] *Nelson & Co.* vs. *Whiting*, 4 E.D.C., 322.

INSOLVENT SCHEDULE. A. BALANCE SHEET.

Estate Dr. Estate Cr.

	Debts.					Assets.		
To Amount of Debts due by the Insolvent, as per List E.					By Amount of Valuation of Immovable Property, per List B. ...			
					By Amount of Valuation of Movable Property, Stock-in-Trade, or Husbandry, etc., per List C. ...			
					By Amount of Outstanding Debts, Bills, Bonds, and other Assets due to the Insolvent, per List D.			
					Balance Deficiency			
					Total £			

. . . . maketh oath and saith, that the above is a true statement, to the best of his knowledge and belief, of his whole Estate and Effects, movable and immovable, personal and real, in possession, expectancy, or contingency, as to which he has any eventual right, and of all Debts due to and by him, to the best of his knowledge and belief.

Sworn at . . . . this . . . .

Day of . . . . before me

. . . . . .

INSOLVENT SCHEDULE B.

Particulars of the Immovable Property of . . . .

Description of Property.	Situation, extent, &c.	Whether Mortgaged, or otherwise.	Valuation.		

INSOLVENT SCHEDULE C.

Particulars of the Movable Property, Stock-in-Trade, &c., &c. . . . .

	Description of the Property.	Valuation.		

INSOLVENT SCHEDULE D.

List of Outstanding Debts, Bonds, Bills, and other Assets of . . . .

Names and Places of Abode of the Debtors.	Particulars of Debt, Security, or Proof.	Good.			Bad or Doubtful.		

INSOLVENT SCHEDULE E.

List of Creditors of . . . .

Names and Places of Abode of the Creditors and Claimants of the Estate.	Particulars of Debt and Security, if any, and whether admitted or disputed.	Amount.		

CHAPTER XXXV.

COMPULSORY SEQUESTRATION.

If a person will not, or thinks he cannot, make a voluntary surrender of his estate as insolvent, it can be done against his will, or even without his knowledge, and is then called "*compulsory sequestration.*" Any of the following acts of omission or commission on the part of any person constitute grounds for insolvency, and for which his estate may be placed under compulsory sequestration.

a. Having property in the Colony, and departing from it.

b. Being out of the Colony, and remaining absent therefrom.

c. Leaving his dwelling-house.

d. Or otherwise absenting himself.

Any of these four acts must be "*with the intent to defeat, "or delay, his creditors in the payment of their debts.*" This "intent" must be fairly presumed, or inferred, from the manner of his leaving, or from the nature or period of his absence. But where a person left the Colony 27 years ago with debts still unpaid, and was still out of the Colony, compulsory sequestration was refused on these grounds, and also because of the antiquity of the debt.[1]

e. Not satisfying the sentence of any competent Court.

f. Not pointing out sufficient property to satisfy it.

g. If he shall make any alienation, transfer, gift, cession, delivery, mortgage, or pledge, of any part of his estate, *with the intent to defeat or delay his creditors, or to prefer one creditor to the other.*[2]

[1] *Barkhuysen* vs. *Van Huysden*, 1 J., 26.

[2] §§ 4 and 9, Insol. Ord.; and *Anderson & Co.* vs. *Hutton & Co.*, B. for 1875, p. 73.

h. If, after the order for sequestration has been made, he pays to a petitioning creditor any money, or gives any satisfaction in security for his debt.[1]

i. If, after a surrender, but before his rehabilitation, he allows any attachment to be made for any deficiency of his insolvent estate.[2]

j. If he allows a writ for civil imprisonment to be issued against him during such insolvency for any deficiency in his estate.[3]

All these causes (from *a* to *j*) are under the Insolvent Ordinance, No. 6 of 1843.

The following is an *additional* cause by virtue of Act 38 of 1884.

k. Whenever the estate of a person can *otherwise clearly be shewn to be insolvent*, and that it would be to the benefit of the creditors to have it sequestrated.[4] But the petitioning creditor must give the clearest proof of insolvency.[5] As to evidence of sufficient proof of insolvency, see further on.

An estate may be compulsorily sequestrated even after a private assignment.[6] So also where it was found impossible to carry through a proposed assignment;[7] but if the Court should be of opinion, from the circumstances disclosed, that the private assignment was working more beneficially than a sequestration would, it can refuse the adjudication.[8] So also has the Court refused the sequestration where the applicant was the only creditor and his claim was disputed.[9]

The process for placing an estate under compulsory sequestration is by petition to the Court, setting forth the amount due and the cause of the debt; and, if there is a security, or part security, for the debt, it must set forth its value,[10] and state the act of insolvency committed. Even after the provisional order has been granted the final adjudication

[1] § 21; and *Noetkling* vs. *Blommestein's Trustees*, 3 M., 276.
[2] § 129.
[3] §§ 124 and 129.
[4] § 3 of said Act; and *Moller* vs. *Askew*, 1 C. T., 11; *Fletcher & Co.* vs. *Le Sueur*, Ibid, 203.
[5] *Prince* vs. *Klosser*, 9 J., 170.
[6] *Deare and Dietz* vs. *Korsten*, B. for 1868, p. 17.
[7] *Warren and Osborne* vs. *Munro Brothers*, 7 C. T., 316.
[8] *De Vos' Trustee* vs. *Bourhill*, B. for 1868, p. 1.
[9] *Kahn* vs. *Shubodien & Co.*, 7 C. T., 315.
[10] § 30.

can be refused, if a value has not been placed on the security.[1] If the security is ample to meet the claim, the Court will not adjudicate the sequestration, but will leave the plaintiff to the usual remedy of a judgment and execution.[2]

The petition for sequestration should be accompanied by an affidavit of verification,[3] and the Master's or Magistrate's certificate that security has been given to his satisfaction for the necessary fees and charges for prosecuting the sequestration.[4] Under the Ordinance of 1843, the *acts* of insolvency as mentioned from *a* to *j* (inclusive) are stipulated; but under the Act of 1884 they are not, but are left to the discretion of the Court or Judge in deciding as to the insolvency. Thus, where a man has called a *meeting* of his creditors; or has endeavoured to *assign* his estate; or has made an *offer* of compromise of so much in the £; or has stated his *inability to pay* his creditors; or has given notice in the *Gazette* of his *intention to surrender;* or has passed or procured *undue* preferences,—*all these have been taken as acts of insolvency justifying the Court, or Judge, in placing the estate under sequestration.* But, in addition to assigning the act of insolvency under the said Act, the petitioner should add "*that it would be to the benefit of the creditors of the estate that* "*it should be sequestrated.*"[5]

But this does not dispense with any of the requirements of the Insolvent Ordinance, and therefore a petitioner seeking to sequestrate an estate by virtue of this Act, and having security, must place a valuation upon such security.[6]

Any creditor petitioning for a sequestration under causes *a* to *j*, inclusive, must have a claim amounting to at least £50;[7] the Court must be satisfied that *primâ facie* the petitioning creditor's debt amount to this sum;[8] and any creditor, or any number of creditors, whose claim, or total claims,

[1] *Standard Bank* vs. *Winterbach*, 4 J., 329; *Van Rensburg* vs. *Mostert*, Ibid, 364; *Fleming & Co.* vs. *Van Eyssen*, Ibid, 366; *Roberts & Co.* vs. *Cape of Good Hope Bank*, 5 J., 134; *Stegman* vs. *Cohen*, 1 C. T., 82; *Standard Bank* vs. *Van Buuren*, 4 C. T., 327.

[2] *Marsh* vs. *Makein*, 2 J., 104.

[3] § 5.

[4] § 7.

[5] *Moller* vs. *Askew*; and *Fletcher & Co.* vs. *Le Sueur*, 1 C. T., 11 and 203.

[6] *Fleming and Mudie* vs. *Van Eyssen*, 4 J., 366; *Grisold Bros.* vs. *Parrott*, 5 J., 79.

[7] § 6.

[8] *Fletcher & Co.* vs. *White*, 11 C. T., 286.

amount to at least £100, can petition for a sequestration for cause given under letter *k*.[1] Any creditor, therefore, whose claim is of the proper amount here given may petition the Court to have the estate of the debtor placed under sequestration;[2] and the sequestration may be followed out by any creditor other than the petitioning creditor.[3] The Court, or Judge, upon being satisfied as to the cause of insolvency, may place the estate under provisional sequestration, and order the defendant to be summoned to shew cause why the estate should not be finally adjudicated for the benefit of the creditors. The return day of such a summons is fixed by the Judge, and may be for any Court day.[4] Generally the return day is fixed at a short date, this being presumed to be as much in the interest of the insolvent as of his creditors; but if any debtor has been absent for 40 days from his usual place of residence, a copy of the summons should be published in the *Gazette* and another should be affixed to the outer door of the Supreme Court.[5] So also in a case where a defendant had left the farm on which he usually resided, and either lived in a tent at an unknown place, or moved about in a waggon, and the summons could not be served upon him, the Court extended the return day of the summons, and ordered it to be published once in the *Gazette*, and a copy to be affixed to the door of the Supreme Court.[6] But in the case of the *Board of Executors* vs. *Rocher's Executors*,[7] the Court intimated that in future, wherever it is known that an insolvent has left the Colony, this fact should be brought to the knowledge of the Judge who is asked for the provisional order of sequestration, and instructions be asked of him as to substituted service, or publication in the *Gazette*. The provisional order of a Judge in every estate must be filed with the Sheriff who, after registering it in his office with the view of stopping writs or detaining money levied, sends it to the Master, in whom the estate then becomes vested;[8] but pending actions may, after a time, be taken up again.[9] But a creditor who has an

[1] § 3 of Act 38 of 1884.
[2] § 5, Insol. Ord.
[3] § 20.
[4] § 17.
[5] Ibid.
[6] *Van Zyl* vs. *Louw*, decided in 1887, not reported.
[7] 2 C. T., 191.
[8] §§ 13, 14 and 22.
[9] §§ 23 and 24.

uncertain, a conditional, or a *contingent* claim, cannot take proceedings to have the estate placed under sequestration, until the condition or contingency shall have been fulfilled or have occurred, nor till then can he vote in the choice of a trustee.[1]

Formerly, if any person wished to oppose the sequestration of his estate, he was obliged, within three days after being served with the summons, to deliver to the attorney of the petitioning creditor, where his residence was within 25 miles of the residence of such attorney, or where it was at a greater distance, to post within the same time, at the nearest Post office, a statement in writing of any facts alleged in the summons, which he intended to dispute; failing which the allegations in the summons were to be taken as admitted.[2] But *now* Rule 148 is repealed by Rule 372, and consequently the defendant, if he wishes to oppose, should do so by affidavit, as is done on motions: and also, if he alleges that he is not insolvent, he should prove it.[3]

The Court may, in its discretion, finally adjudicate the sequestration of the estate, or dismiss the petition.[4] If it be proved to the Court that any petition is unfounded and vexatious or malicious, the defendant may then and there, without filing pleadings, prove his damages sustained in consequence and obtain judgment for them;[5] but his omission forthwith to prove damages does not deter him from claiming them by action.[6]

Where a provisional order of sequestration had been granted on a return to a writ of execution issued on a superannuated and unrevived judgment, it was superseded and the compulsory sequestration refused.[7] But without the revival of a superannuated sentence the estate may *now*, under Act of 1884, be compulsorily sequestrated.

Any creditor having an interest in the estate may also oppose the application for sequestration, though the debtor

[1] § 31.

[2] Rule of Court 148; and *Leeuwner* vs. *Meehau*; and *Anderson and another* vs. *Webster*, 3 M., 322 and 220.

[3] *Simpson & Co.* vs. *Fleck*, 3 M., 213; and *Gates* vs. *Honeyborne*, B. for 1869, p. 58.

[4] § 18.

[5] § 19.

[6] *Askew* vs. *Moller*, 1 C. T., 128 and 129.

[7] *Brink* vs. *De Lima*, 3 M., 304.

himself does not appear; but he need not give notice to the petitioning creditor of his intention to dispute the act of insolvency.[1]

The Court may grant a postponement of the sequestration, on the application of either the petitioner or the defendant, if sufficient cause for delaying the sequestration be shewn.[2]

A person who has been duly summoned to shew cause why his estate should not be sequestrated may oppose the adjudication.[3]

A second, or later, sequestration cannot be granted, though leave to trade may have been given to the insolvent, until the *final* account in the estate has been confirmed.[4]

There is a right of appeal to the Supreme Court from a sequestration granted by a lower Court.[5]

A final order of sequestration may be recalled where the order has been improperly obtained.[6]

A creditor, who is entitled to immediate payment of his debt, need not wait for the fulfilment of conditions of sale which may prove beneficial to the defendant, and thus an order for compulsory sequestration must be made absolute.[7]

The mere fact that the estate of the defendant, who had a colonial as well as an English domicile, had been sequestrated in England, was no bar to an action against the defendants in this Colony.[8] But where the English Bankruptcy Court had requested of the Colonial Court a power in *aid* to liquidate the estates in both countries, all actions against the insolvents were stopped.[9]

Though a notice of a voluntary surrender has been given, there is nothing to prevent the Court from placing the estate under compulsory sequestration.[10]

The petitioning creditor may, after he has obtained the provisional order of sequestration, ask to have it discharged;

[1] *Meiring* v. *Black and another*, 3 M., 300.
[2] *Drummond* vs. *Marillac*, 1 J., 2.
[3] *Re Benjamin*, B. for 1875, p. 117.
[4] *Alford and Wills* vs. *Townsend*, 4 J., 153.
[5] *Roberts* vs. *Cape of Good Hope Bank*, 5 J., 134.
[6] *Ritchie* vs. *Andrews*, 2 E.D.C., 254; for analogy, see *Richards* vs. *Doveton's Trustees*, 3 J., 123.
[7] *Porter* vs. *Executors of Roberts*, 2 J., 286.
[8] *Reynolds* vs. *Howse and Early*, 3 E.D.C., 304; B. for 1875, p. 79.
[9] *Est. Howse Sons & Co.*, 3 J., 14.
[10] *Nelson* vs. *White*, 4 E.D.C., 322.

or he may, after obtaining the final order of adjudication, ask to have it superseded.[1] If no administration takes place on the final sequestration, the insolvent may also petition the Court for the supersession, or discharge, of the final order.[2] But so long as the order, whether provisional or final, is not cancelled by the Court, in case of non-administration, the estate remains in the hands of the Master, though he knows there has been no meeting of creditors and no election of trustee.

A defendant whose estate has been placed under provisional sequestration cannot confess judgment in order to be freed from an arrest, or civil imprisonment, as the estate is vested in the Master; and such confession is not binding on him or on the trustee. He may, however, move to be discharged from imprisonment.[3]

Petition for compulsory sequestration on an unsatisfied debt.

(Heading.)

Humbly sheweth :—

1. That . . . . is justly and truly indebted to your petitioner in the sum of £. . . . sterling, being the amount of a certain (*here briefly describe the debt*) for which sum your petitioner obtained judgment against him on the . . . . day of . . . . in this Honourable Court.

2. That on the . . . . day of . . . . your petitioner issued out of this Honourable Court a writ of execution (certified copy of which is hereunto annexed) against the goods and chattels of the said defendant for the said sum together with the interest thereon from the . . . . day of . . . . in terms of the said judgment; and also for the sum of £ . . . . sterling, being the taxed costs and charges incurred by your petitioner in obtaining the said judgment.

3. That the sheriff of this Colony was duly entrusted with the execution of the said writ, and the said defendant was afterwards required by the said sheriff to satisfy the said judgment, or to point out sufficient disposable property to satisfy the same.

4. That it appears from the return made by the said sheriff to the said writ (certified copy of which return is also hereunto annexed) that (*here state the nature of the return*).

5. That in consequence of the failure of the said defendant to satisfy the said judgment, as appears from the said return, he has committed an act of insolvency.

[1] See also *Arderne* vs. *Silesian Institute*, decided 1902, not reported.

[2] See Leibbrandt, in 1886, not reported.

[3] *Re Davidson*, 5 J., 93 and 99.

6. Wherefore your petitioner most humbly prays that your Lordships may be pleased to place the estate of the said . . . . under sequestration for the benefit of the creditors thereof.

. . . . (*Affidavit of Verification.*)

Security to the Master.

I hereby interpose and bind myself as surety to the Master of the Supreme Court for the payment of the necessary fees and charges for the prosecution of the sequestration in this matter until the choice or appointment of a trustee.

Dated at . . . . this . . . . day of . . . .

Master's certificate.

I hereby certify that security has been found to my satisfaction for the payment of the necessary fees and charges for the prosecution of the sequestration in this matter until the choice or appointment of a trustee.

Master's Office, Cape Town, this . . . . day of . . . .

Judge's order.

Upon reading the foregoing petition and affidavit of . . . . I order that the estate of the said . . . . be placed under sequestration in the hands of the Master of the Supreme Court, and that the said . . . . on being duly summoned thereto by the said . . . . do appear before the Supreme Court on . . . . the . . . . day of . . . . at 10 o'clock in the forenoon, to shew cause, if any, why his estate shall not by judgment of the said Supreme Court be adjudged to be sequestrated for the benefit of the creditors thereof.

Dated at Cape Town, this . . . . day of . . . .

Summons for compulsory sequestration (on an unsatisfied debt).

(Heading.)

Whereas upon petition of . . . . of . . . . it appears to us that . . . . of . . . . is justly and truly indebted to the said petitioner in the sum of £ . . . . sterling, being the amount of certain . . . . for which said sum the said petitioner has obtained judgment against the said . . . . on the . . . . day of . . . . in this Honourable Court.

And whereas it further appears to us that on the . . . . day of . . . . the said petitioner issued out of this Honourable Court a writ of execution against the goods and chattels of the said defendant for the said sum, together with the interest thereon, from the . . . . day of . . . .; and the sum of £ . . . . being the taxed costs and charges of the said petitioner, and that the said defendant was afterwards required by the Sheriff of this Colony to satisfy the said judgment, or to point out sufficient disposable property to satisfy the same ; but that it appears from the return

made by the said Sheriff to the said writ that . . . . and that in consequence of the failure of the said defendant to satisfy the said judgment, as appears from the said return, he has committed an act of insolvency; whereupon the said petitioner prayed that the estate of the said . . . . might be sequestrated for the benefit of the creditors thereof.

And whereas it further appears to us of record that the Honourable . . . . one of the Judges of the Supreme Court of our said Colony, did, by an order under his hand, bearing date the . . . . day of . . . . place the estate of the said . . . . under sequestration in the hands of the Master of the Supreme Court until the same should be thereafter adjudged to be sequestrated.

Now therefore, we command you that you summon the said . . . . of . . . . that he appear before our Judges of our Supreme Court of our said Colony, at Cape Town, on the . . . . day of . . . . at 10 o'clock in the forenoon, to shew cause, if any, why his estate should not, by sentence of the said Supreme Court, be adjudged to be sequestrated for the benefit of his creditors; and serve on the said . . . . a copy of this summons, and return you this summons immediately after the service thereof with whatsoever you have done thereupon.

Witness, &c.

. . . . . .
Registrar of the Supreme Court.

. . . . . .
Plaintiff's attorneys,
De Lettre Chambers, Church Square,
Cape Town.

Petition for compulsory sequestration where defendant has absconded and petitioner has some security for his debt.

(Heading.)

1. That A.B. of . . . . is justly and truly indebted to your petitioner in the sum of £ . . . . sterling, being the amount of a certain (*here describe nature of debt, as for instance*) mortgage bond passed by him in your petitioner's favour on the . . . . day of . . . ., and by which the farm . . . . is hypothecated, together with the interest thereon from the . . . . day of . . . .

2. That the said A.B. on the . . . . day of . . . . recently left his dwelling-house, and is said to have gone to (*state whither, if possible, for instance*) Australia by the steamer . . . . which left this port for Australia on the evening of that day.

3. That since the passing of the said mortgage bond (*here state why the security is or has become insufficient, as for instance*) the said A.B. gave way to habits of intemperance; and owing to his neglect of his farming operations the farm has become reduced in value and is not now worth more than about £ . . . ., and that your petitioner's security is therefore only of the value of about the sum of £ . . . .

4. That, by reason of the said A.B.'s clandestine departure aforesaid,

he has left the Colony with the intent to defeat or delay your petitioner and his other creditors in obtaining payment of their debts; and that consequently he has thereby committed an act of insolvency.

Wherefore your petitioner humbly prays, &c.

(*Affidavit of Verification.*)

Petition for compulsory sequestration by reason of the defendant having left his residence and departed from the Colony.

(Heading.)

1. That A.B. of . . . . is justly and truly indebted to your petitioner in the sum of £ . . . . sterling, being the amount of a certain (*here describe the nature of the debt*).

2. That the said A.B. clandestinely left his dwelling-house and departed by the mail steamer which left for England yesterday afternoon.

3. That he has made no provision for the payment of your petitioner's debt, or any part thereof, nor, as far as your petitioner is aware, has he authorised any person to do so.

4. That the said A.B. has left his dwelling-house and departed from this Colony with the intent to defeat or delay your petitioner and his other creditors in obtaining payment of their debts.

5. That in consequence thereof the said A.B. has committed an act of insolvency.

6. Wherefore your petitioner most humbly prays that your Lordships may be pleased to place the estate of the said A.B. under sequestration for the benefit of the creditors thereof.

(*Affidavit of Verification.*)

Summons for compulsory sequestration by reason of the defendant's departure from his dwelling-house.

(Heading.)

Whereas upon petition of C.D. of . . . ., it appears to us that A.B. of . . . . is justly and truly indebted to the said petitioner in the sum of £ . . . . sterling, being the amount of certain (*here describe the nature of the debt*); and whereas it further appears to us that the said defendant had clandestinely left his dwelling-house and departed by the mail steamer which left for England on the . . . . day of . . . . ; and that he had made no provision for the payment of the petitioner's debt, or any part thereof, nor had he authorised any person to do so; also that the said defendant had left his dwelling-house and departed from this Colony with the intent to defeat, or delay, the petitioner and his other creditors in obtaining payment of their debts; and that in consequence thereof the said defendant had committed an act of insolvency.

Whereupon the petitioner prayed that the estate of the said A.B. might be sequestrated for the benefit of the creditors thereof.

And whereas it further appears to us of record that the Honourable

.... one of the Judges of the Supreme Court of our said Colony, did, by an order under his hand, bearing date the .... day of ...., place the estate of the said (*here follow the rest of the preceding summons*).

Petition for compulsory sequestration under Act 38 *of* 1884.

(Heading.)

1. That A.B. of .... is justly and truly indebted to your petitioner in the sum of £ .... sterling, being the amount of certain (*state nature of debt, for instance*) three promissory notes bearing date respectively ...., and signed by the said A.B. in your petitioner's favour.

2. That (*here state any cause or proof of insolvency, for instance*) the said A.B. had, on the .... day of ...., at a meeting of his creditors, admitted his inability to pay them in full, and offered a compromise of .... shillings in the £, which was refused.

3. That in consequence thereof the said A.B. has committed an act of insolvency, and it would be to the benefit of the creditors that his estate should be sequestrated:

Wherefore your petitioner humbly prays (*conclude as in preceding petitions*).

(*Affidavit of Verification.*)

CHAPTER XXXVI.

PROVISIONAL TRUSTEES.

THOUGH upon the sequestration of an estate it is vested in the Master of the Supreme Court,[1] it is often necessary to appoint one or more trustees, *provisionally*, to take charge of it till the election, by the creditors, of one or more permanent trustees.

The necessity for the appointment of provisional trustees must be shewn to the satisfaction of the Court, or a Judge on circuit;[2] and though their number is not limited, as in the case of permanent trustees (§ 40), yet in no instance has the Supreme Court ever appointed more than three, and has often refused to appoint more than one.[3] The size of the estate and its being split up in different localities are the criteria for the Court in the appointment of the number of provisional trustees.

The application for the appointment of a provisional trustee must be made by petition of one or some of the creditors of the estate, setting forth the facts calling for the necessity for a person, other than the Master, to take charge of the estate, pending the election of a permanent trustee; and praying who should be appointed, and the powers desired.

The facts will depend upon the circumstances of each case, as for instance—

(*a*) That the estate is a large one and scattered over several localities.

[1] §§ 1, 13, 14, 46–48 of Insolv. Ord.
[2] § 43 and *re Morris*, B. for 1875, p. 1.
[3] *Re Est. Louw*, 1865, not reported.

(*b*) That there is live stock which must constantly be attended to.

(*c*) That there are perishable articles which must be taken care of, or perhaps sold, or otherwise disposed of at once.

(*d*) That the sheep or goats are lambing or kidding and must be attended to, or that they have been washed and must be shorn.

(*e*) That the crops are ripening and must be reaped and gathered.

(*f*) That the insolvent has a large business which it would be to the interest of the creditors to carry on for the benefit of the estate without interruption through the insolvency; as for instance in the case of a dock agency,[1] or the publication of a newspaper,[2] or a togt-rider (trader), or farming operations.[3]

(*g*) That the retention of a certain part of the estate would entail unnecessary expense, and that it would be more to the advantage of the estate to sell as soon as possible.

But the Court will not appoint a provisional trustee, if the necessity for it cannot be shewn: for instance, if the estate can just as well be taken care of by the Master or Magistrate's Messenger, and is not likely to deteriorate or cause extra expense, before a permanent trustee can be elected.

In the case of a contest for the office of provisional trustee, the Court will appoint the one who is, or those who are, under all the circumstances, best entitled to it.

In the absence of any special power given by the Court, the provisional trustee cannot make sale of any part of the estate, but he may act in the collection, administration, and distribution of the estate as an elected trustee.[4] His remuneration is the same as that of an elected trustee,[5] and if he should only have taken care of the estate, and another trustee have been elected to liquidate it, he should be remunerated in proportion to the extent of the care he has exercised; but the elected trustee, whether the provisional

[1] *Re McKenzie* in 1882.

[2] *Re Armstrong* in 1876, and *re Lovegrove & Co.* in 1883.

[3] *Re Van Wyk*, 1875, none of which is reported.

[4] § 43 of Insol. Ord.

[5] § 44.

trustee or not, cannot charge twice for the same work done, or as if he had done all the work, but the whole charge against the estate must be as if for one act by one man.[1]

The provisional trustee may, with consent of the Court, obtained upon application by petition, open, in the presence of the Master, or of some other person authorised by the Court, all letters addressed to the insolvent, and for that purpose may receive them at the post office.[2]

Though no special provision is made for it in the Ordinance, the Supreme Court has often appointed, of its own accord, provisional trustees finally to liquidate an estate, where the creditors have failed, for whatever cause, to elect a permanent trustee, and where there is no prospect of an early election or an election with different result. Thus, where in an election for trustees the number of the creditors does not proportionally represent the value of their respective claims [*e.g.*, if six creditors should represent claims amounting to £5,000, while four creditors represent claims amounting to £9,000],[3] the Court has sometimes appointed both the nominees of the two sets of contending creditors; sometimes only one of the two nominees; and in one case, after three elections held each time with the same result, the Court appointed an outsider, in no way suggested by any of the creditors, as provisional trustee; and all with the full powers to liquidate the whole estate as if a trustee (or trustees) had been duly elected by the creditors.[4]

The appointment of a provisional trustee will not be set aside by the Court so long as no permanent trustee has been duly elected by the creditors.[5] Until the final sequestration of an estate, no provisional trustee can be appointed, but the estate, even by a provisional order, is vested in the Master,[6] who should take care of it; but he may appoint *curators bonis* to take care of or carry on the business of the estate, so far as

[1] *Est. Stock*, 1878 and 1879.

[2] *Est. Robinson*, 1863; *Est. Moore*, 1875; and *Est. de Marillac*, 1878, none of which is reported.

[3] § 40.

[4] B. for 1876, p. 4; *re Cullinam*, B. for 1868, p. 105; *re Archer; Est. Beyers* deceased 1868; and *Est. L.* deceased, November, 1872, neither of which is reported: *re Lyons Brothers;* and *re Tale*, 2 J., 136 and 369.

[5] *Re Est. Viljoen*, 1 C. T., 59.

[6] §§ 43 and 47.

it is absolutely necessary, until the appointment of a provisional or permanent trustee.[1]

Petition for the appointment of a provisional trustee.

To His Honour the Chief Justice and the other the Judges of the Supreme Court of the Colony of the Cape of Good Hope.

The petition of the undersigned creditors of the insolvent estate of . . . . of . . . .

Humbly sheweth :—

1. That your petitioners are creditors of the said insolvent estate to the amounts set opposite their respective signatures.

2. That the estate of the said insolvent principally consists of (*here name the part of the estate which requires to be specially taken care of or to be disposed of, for instance, that in the said estate there is*) a great deal of confectionery of a perishable nature which must be disposed of, or attended to, at once; and it is necessary that a provisional trustee be appointed to take charge thereof pending the election of a permanent trustee.

3. That Mr. A. . . . . of . . . . is a fit and proper person to be appointed the provisional trustee of the said estate.

4. Wherefore your petitioners humbly pray that your Lordships may be pleased to appoint the said A. . . . . to be the provisional trustee of the said estate until such time as a trustee can be elected by the creditors; and with power forthwith to sell the perishable articles herein mentioned.

And your petitioners as in duty bound will ever pray.

(*Affidavit of Verification by one of the petitioners.*)

Another petition for same purpose with power to sell crops, &c.

(Heading and Clause 1 same as before.)

2. That the crops of the insolvent on his farm are beginning to ripen and it is necessary that they should be cut and gathered in time; that there are about 3,000 sheep that have been washed and are ready to be shorn; that there are about 18 horses in the stable and a large troop of horses, cattle and goats which require to be taken care of; that there are about 25 men employed as monthly labourers on the farm; and that it is necessary that a provisional trustee should be appointed to take immediate charge of the said estate.

3. (Here insert Clause 3, as above.)

4. Wherefore your petitioners humbly pray that your Lordships may be pleased to appoint the said A. . . . . to be the provisional trustee of

[1] *Wood* vs. *Webb*, 4 E.D.C., 4; *re Solomon & Co.*, decided Sup. Court, 1884, not reported; *re Arnols*, 1 C. T., 99; *re Cortis*, 1892; *re Sceredan*, 4 C. T., 185.

the said estate until such time as a trustee or trustees can be elected by the creditors; and that he may have power to engage the labourers on the farm, or elsewhere if necessary, to reap and gather the crops, to shear the sheep, to dispose of such of the saddle and carriage horses in the stable as are not required for his purposes in working the farm, and generally also to sell perishable articles.

And your petitioners, &c.

(*Affidavit of Verification.*)

Petition to receive from post-office and to open letters addressed to the insolvent.

(Heading.)

Humbly sheweth :—

1. That your petitioner is provisional trustee in the insolvent estate of C. D. of . . . .

2. That from your petitioner's knowledge of the affairs of the insolvent (or *that from information received from . . . . a creditor of said insolvent*) there is good reason to believe that letters from (Europe) to the insolvent will throw a great deal of light and information on his affairs, dealings and transactions before insolvency, which cannot by means of any inquiry be obtained with the same degree of certainty and speed.

Wherefore your petitioner humbly prays that your Lordships may be pleased to order that all letters for the said insolvent, arriving from Europe, may not be handed to the insolvent by the General Post-office, but to your petitioner; and may either be opened and read by your petitioner or by some other persons to be appointed by this Honourable Court, before being handed to the insolvent, and if of any consequence to the affairs of the estate then to be detained by your petitioner till the further order of Court.

And your petitioner, &c.

CHAPTER XXXVII.

PROOFS OF DEBT, AND THE RANKING OR SETTLING OF DEBTS.

EVERY debt, however small or large, must be proved by affidavit, and can be proved at any of the three usual meetings of creditors, or at any special meeting called for that purpose.[1] Any person can prove a debt without a power, but no one acting for a creditor can vote for the election of a trustee without a special power.[2] The affidavit of the proof of debt can be made by anyone who has a knowledge of the debt, stating how this knowledge was derived; as, for instance, in his capacity as Book-keeper, or Clerk, or Manager, or Plaintiff's or Defendant's Attorney. If the debt is on an open account, it should give the date when incurred; if by a cession, the date should also be given. The object of the date is to see whether the debt is due, or has become prescribed. It may also affect a question of undue preference or fraud, or preference under a general covering bond. The affidavit should therefore state the nature of the debt, and when incurred originally; and that it is a just, true and lawful debt.[3]

As compound interest, in the absence of a special contract to pay it, is not allowed by law, and as an interest can never exceed the capital,[4] it follows that a creditor can prove only for interest, not compound interest, nor interest exceeding the capital.

If the debt is secured, or partly secured, whatever security is held for it should also be stated in the affidavit, *and the value of the security should likewise be mentioned.* For instance,

[1] §§ 25–27 Insolvent Ordinance.
[2] § 31, Ibid.
[3] § 27, Ibid.
[4] V. d. Linden, 1, 15, 3, §§ 3 and 4.

if it be a Bond, whether Mortgage or Notarial; or an endorsation to a note or a Bill, or a Pledge, or a Life Policy, it should be so stated, and briefly described, and the value thereof given: and if there be a surety, his name and address should also be given.[1] A person holding a *lien* upon anything belonging to an insolvent, *should, in proving his claim, state in the affidavit the nature of the lien, else he will lose his lien.* He would nevertheless be bound to give up the subject-matter of the lien to the trustee, to be realised; but by having mentioned the nature of his lien in his affidavit, he would be entitled to the proceeds thereof to the extent of his claim. If however he should be insufficiently paid on his claim, he can, for the deficiency, claim concurrently, like any other concurrent creditor, upon the remaining assets of the estate. The balance, if any, must go to the benefit of the estate. There is a great difference between a pledge and a lien. While *the pledge or any other security must be annexed to the affidavit of proof of debt, the nature of the lien should be clearly described in the affidavit, aud the thing itself be given up on the demand of the trustees.* Thus, suppose A has repaired the watch of B. So long as the watch is in his (A's) possession he has a lien on it for his repairs thereto, and need not give it up to B till he is paid. The moment he parts with the watch his lien is lost. But if B becomes insolvent before the delivery of the watch, A is then bound to give it up to the trustee, to be realised; *but he can protect his lien by mentioning it in the affidavit of proof of debt.* So also as regards an attorney's lien. If A, an attorney, has done some specific work, on some special papers of B entrusted to him for that purpose, such as passing Transfer or Bond, or drawing any other deed, the attorney has his special lien on those papers for his charges; but not on papers which have come into his possession in the usual way, and *on which no particular or special work has been done.*[2] In any case, he also must hand up the papers to the trustee, reserving his lien.[3]

[1] § 27 Insolv. Ord.

[2] G.P.B., Vol. 2, p. 722, Art. 80; Ibid, p. 813 and 166; Voet, 42, 7, 7.

[3] §§ 27, 30 and 48 Insolvent Ordinance.

The debt proved by a creditor or his agent must be to the satisfaction of the Master, or Magistrate, before whom the meeting is held;[1] and if a creditor holds any preferable security or lien upon any part of the estate, he must put a value upon such security, and, to deduct it from the debt proved, specify the balance without prejudice.[2] And so also where there is an account current between the parties, or mutual credits or debts, or the creditor is also indebted to the estate no matter in how small a sum, he should set off and prove only for the balance of his claim.[3]

In the case of a second surrender, before the insolvent shall have been rehabilitated of his first surrender, the creditors of his first estate are entitled to prove on the second estate, just as if the last order of sequestration had been the only order ever issued.[4] The 17th section of Act 38 of 1884 does not take away or affect the right of the creditors under the 130th section of Insol. Ord.[5]

If the Master or the Magistrate should not be satisfied with a debt proved, he ought to reject it, thus leaving the creditor to satisfy the Court as to the legality or justness of his claim. The Magistrate or Master is therefore justified in refusing a claim which contains an item for alleged damages sustained, as the measure of damages is still a question to be ascertained, and settled by a Court of law.[6] Hence a claim for unliquidated damages should not be admitted until the amount has been duly fixed by judgment of a competent Court.[7] Claims or debts that are prescribed before the date of sequestration cannot be proved. In the case of *Naudé Executor* vs. *Hall and Co.*,[8] the Chief Justice said: "Proof of debt is bringing an action. As soon as some opportunity was given to prove the debts prescription could not from that time continue to run." If the Master or Magistrate should either have admitted or rejected a proof,

[1] § 27, Ibid, and *re Anderson*, 3 M., 222.

[2] § 30, Ibid.

[3] § 28, Ibid, and *Herron* vs. *Searight & Co.*, 3 M., 345.

[4] § 130 Insolv. Ord.; and for analogy, see *Warner's Assignees* vs. *Warner's Trustees*, 4 J., 227.

[5] *Lindenberg* vs. *Gibson*, 13 S. C., 24.

[6] *V. d. Byl & Co.* vs. *Langford's Trustees*, 7 J., 235; *Magadas* vs. *Trustee of Magadas*, 2 M., 345; and *Dielman* vs. *Anderson*, 3 M., 222; and *Chisholm* vs. *Anderson's Trustees*, 2 A.C., 34.

[7] *De Klerck* vs. *Zeeman and another*, 6 C. T., 192; Ibid, 13 S. C., 181.

[8] Decided 1902, not reported.

which should respectively have been either refused or admitted, the disappointed creditor, in the one case, can move the Court that his rejected claim may be admitted; or any creditor, or the trustee, in the other case, can move that a proof admitted should be expunged.[1] And if the Court should think the question of such importance that it can best be decided by action, they may, instead of deciding it on motion, order an action to be instituted.[2] The Master or the Magistrate has no jurisdiction to alter or re-open the proof which has been allowed by him.[3]

A trustee has no right to admit a proof of debt which has either been rejected by, or not submitted to, the Master or Magistrate, even although he has the consent of the creditors.[4] Nor can he set aside or ignore a proof of debt admitted by such officer, but must apply to the Court, upon notice to the creditors.[5] Any creditor may also apply to the Court for leave to amend his proof of debt, upon good cause shewn, in which case notice of the application must be given to the trustees; for instance, the Court, as Upper Guardian of Minors, allowed a proof, which had been made on the estate of a guardian as concurrent, to be altered to, and ranked as, preferent.[6] A creditor may without leave of the Court withdraw his proof and claim, but he is up to then liable for his *pro rata* share of costs *bonâ fide* incurred by the trustee.[7] Although a debt may be not yet due, it may be proved and valued in the voting:[8] but a debt which depends upon a *contingency* which has not happened, or a condition which is still unfulfilled, cannot be proved till then, unless the trustee has valued it, who is then to admit the creditor to prove for the amount so ascertained.[9] But a bond, with sureties who

[1] § 27 Insolv. Ord.

[2] *Re Patterson*, B. for 1869, 95; *re Magadas*, 2 M., 345; *Brink's Trustees* vs. *Munnik*, 1 R., 362; *Trustees Tritch* vs. *Berrangé*, 3 J., 219; *Paterson* vs. *Umsinto Sugar Company*, B., 1876, p. 160.

[3] *Van Schalkwyk* vs. *Pienaar's Trustees*, 8 C. T., 329.

[4] *Re Anderson*, 3 M., 222.

[5] *Re Brink* and *re Barson*, 1 R., 305 and 369.

[6] § 28 Insol. Ord., and *Hiddingh's Exors.* vs. *Hiddingh's Trustees*, 4 J., 200; *Est. Pilgram*, 1 C. T. 287; *Botes* vs. *Meere*, 1 J., 28; *re Paterson*, B., 1875, p. 45; *Stewart's Assignee* vs. *Wahl's Trustee*, 3 J., 243.

[7] *Cressy and others* vs. *Haarhoff's Trustees*, 5 C. T., 157; Ibid, 12 S. C., 123.

[8] § 29 Insol. Ord.

[9] § 31, Ibid, and *Trustee of Leigh* vs. *Leigh*, 1 J., 75; *Copestake* vs. *Alexander*, 2 J., 137.

have renounced the exceptions, is not a contingent claim, where one of the sureties, and not the principal debtor, has surrendered his estate.[1]

The claims of a person who is absent from the Colony, which have not been proved, may be allowed by the Court, upon good cause appearing, to be entered on the proceedings in the insolvent estate, and the creditor may be allowed a reasonable time to prove it.[2]

In a proof of debt, a person may also claim the interest due, or to become due thereon, and in certain cases the claim may be subject to a rebate of interest. *Interest on a bond is preferent only for a year, and a current year;* if more than this is due, the balance interest is concurrent: but the interest from the date of sequestration is preferent up to the day of payment.[3] Thus suppose a man surrendered on the 1st July, 1892, and there is interest due on a bond from 1st January, 1884, interest would be preferent from the 1st January, 1891, to the time of the order of the sequestration; and from the date of the order of sequestration, interest would be preferent also up to the date of payment; but the interest due to and before the 1st January, 1891, would be concurrent. Children may prove on the insolvent estate of the surviving parent for their tacit hypothec, out of the estate of the first dying parent in respect of their inheritance or *fidei commissum;* and this tacit hypothec is preferent over a special mortgage, passed by the survivor, after the death of the first dying. Sometimes, according to circumstances, the tacit hypothec is preferent only as to one half, and concurrently as to the remaining half.[4]

Partnership creditors must prove on the partnership estates, and private creditors on the private or separate estates of the insolvent partners. But if the partnership creditors are paid in full, any balance of partnership assets must go to, and be distributed among, the creditors of the

[1] *Re Dennys*, 3 M., 309.

[2] § 32 Insol. Ord.

[3] §§ 29 and 33, Ibid, and *re Whitcomb*, 3 M., 211; *re Stander*, B. for 1873, p. 92; *re Meiring*, 2 M., 318; *Brink* vs. *High Sheriff and others*, 12 S. C., 414.

[4] *Hiddingh* vs. *de Roubaix*, B., 1878, 36; *Jennings* vs. *van Wyk*, 7 J., 228; and see Chapter "*Hypothecations.*"

private estates, and *vice versâ*: and if any private estate has paid the company's creditors, it can prove and rank for so much on the co-partners' separate estates. But no partner who is insolvent, and no trustee of any insolvent partner, shall rank for contributions upon the insolvent estate of any other partner to the prejudice of the company's creditors claiming on the private estate.[1]

Any creditor of any firm may vote on the private estate of any insolvent partner of that firm, in the election of trustees, and in the matter of agreeing to or dissenting from any offer of compensation, and of the insolvent's rehabilitation; and when such creditor is the petitioning creditor, he may recover dividends, but not otherwise.[2] And any creditor who holds a general bond is entitled to a vote for the full amount of his claim in all matters regarding the property over which he has the security.[3]

Either on the filing or proving of the proof of debt, or within a reasonably short time thereafter, the creditor should tender to the trustees the document, or title deeds, or transfer, or life policy, or other subject-matter, on or by which he alleges in his proof that he holds a lien, as every asset in an estate must be given up to be realised by the trustees; and if he fails to do so, the trustees can compel him, by notice of motion, to hand it up for realisation.[4] But the trustee, instead of claiming the security, may allow the creditor to retain it in part payment of his claim, and he may also, if to the benefit of the estate, pay a preferent creditor the amount of his lien, and so release the property, without a proof of debt being filed by the creditor;[5] and even though a creditor may not have proved his claim, he still retains the right to do so, and can set it off against any claim the estate may have upon him.[6]

The costs in establishing a proof before a court of law

[1] § 34, Insolv. Ord., and *Copestake and others* vs. *Alexander*, 2 J., 137; *Bates* vs. *Hunt*, Ibid, 179; *Norton's Trustees* vs. *Norden's Trustees*, 3 M., 330.

[2] § 35 Insol. Ord.

[3] *Burger and others* vs. *De Villiers*, 8 C. T., 219.

[4] *Penny* vs. *Wilson*, Watermeyer, 14; *Kellar's Trustee* vs. *Edmeads*, 3 J., 25; *Trustees Tritch* vs. *Berrangé*, Ibid, 217; *Osmond's Trustee* vs. *Hofmeyr*, 4 J., 43; *re Viljoen*, 1 C. T., 154.

[5] *Fryer* vs. *Farquhar's Trustees*, B., 1879, p. 226.

[6] *Samnan's Trustees* vs. *Joseph*, B., 1876, p. 229.

form part of the costs of administration, and must be allowed in the proof, and also whatever other costs can be *bonâ fide* said to be part of the costs of administration.[1] For a further example of what claims against the estate may be paid without "proof of debt" see Chapter on "*Trustees' Accounts.*"

In connection with this subject the Chapter on "Hypothecations" should be studied.

Notice of motion by a trustee on a creditor, to give up the subject matter of a lien referred to in the proof of debt.

(Heading.)

A.B. in his capacity as trustee in the insolvent estate of C.D., applicant, *vs.* E.F., respondent.

Sir—Take notice that application will be made by the above applicant to this Honourable Court on the . . . . day of . . . . at 10 o'clock a.m. for an order compelling you to give up (*state here what it is, for instance*) certain deeds of transfer in favour of the said insolvent of the farms . . . . and . . . . and referred to in your proof of debt on said estate.

And to shew cause why you shall not be ordered to pay the costs of this application.

Dated at C . . . . T . . . . this . . . . day of . . . .

. . . . . .
Applicant's Attorneys.

To E.F. of . . . .
the above respondent.

(NOTE.—*Make an affidavit in support as to facts in foregoing notice.*)

Notice of motion calling upon the trustee to shew cause why a certain proof of debt shall not be admitted on the insolvent estate.

(Heading of Court.)

Between A.B., applicant,
vs. C.D., in his capacity as trustee of the insolvent estate of E.F., respondent.

Sir—Take notice that application will be made to this Honourable Court on the . . . . day of . . . . at 10 o'clock in the forenoon, on behalf of the above applicant, who claims to be a creditor of the said insolvent estate, for an order compelling the Master of this Honourable Court (or a Resident Magistrate of . . . .) to admit and to rank the proof of debt tendered by him to the said Master (or Resident Magistrate) at the meeting of creditors of the said insolvent estate held before him on the . . . . day of . . . . last past, and which said proof was refused by him on the ground that (*here state the reason why, if any reasons were given,*

[1] 2 M., 321; 2 J., 386, and 7 J., 235; *Brink* vs. *High Sheriff*, 12 S. C., 414.

for instance) the said insolvent has alleged that the said debt was not a *bonâ fide* one and not for valuable consideration.

And further to shew cause why you shall not be ordered to pay the costs of this application.

Dated at Cape Town this . . . . day of . . . .

. . . . . .
Applicant's Attorneys.

To C.D., Esq.

In his capacity as trustee of the insolvent estate of E.F. of . . . . the above respondent of . . . .

Affidavit in support of preceding notice.

(Heading.)

Same as notice.

I, A.B., of . . . . make oath and say :—

1. That at a meeting of creditors of the said insolvent estate held before the Master of this Honourable Court (or the Resident Magistrate of . . . .) on the . . . . day of . . . . last past, I tendered the proof of debt hereunto annexed marked A, but the Master (or Magistrate) refused to admit it on the ground, as was alleged by the said insolvent, who was present at the said meeting, that the said debt, mentioned in the said proof, was not a *bonâ fide* one and was not for a valuable consideration.

2. I say further (*here give the cause of the debt, for instance*) that this debt arose in the following way : On the . . . . day of . . . . G . . . . was committed for trial by the Resident Magistrate of . . . . on a charge of . . . ., but was allowed out on bail, himself in £500 and two sureties of £250 each, and that the said insolvent was one of the sureties, and one H . . . . another, and they duly signed the bail bond.

That about a week after this the said insolvent asked me to lend the said G . . . . a sum of £250, but when I declined to do so, owing to the criminal charge against G . . . . the insolvent said that he would be responsible to me for a refund of the money, and I accordingly gave G . . . . the £250, and took the promissory note for it, annexed to my said proof of debt.

3. I say further that at the time I gave the money to G . . . . I was led by the insolvent to believe that the money was required for the defence of G . . . ., and it was not until some days thereafter I had suspicions that the said G . . . . was contemplating to, and did ultimately, surreptitiously leave this Colony for Australia.

4. I say further, I was no party, either directly or indirectly, to this escape of G . . . ., but when my suspicions about G . . . .'s movements were aroused, I spoke to the insolvent about them and asked him if he was safe as to his bail, and as to his note due to me, when he ridiculed the idea of G . . . .'s leaving, to escape justice, and told me "to hold my tongue" as G . . . . was only going to Natal on a little bit of a spree to recover from the effects of the charge laid against him, and thus be better

able to prepare for his defence. Though I had my misgivings about G . . . . I trusted and believed what the insolvent had told me, and on the faith of that I lent G . . . . at his own request the sum of £50, but this sum I do not claim from the insolvent estate.

5. I say, lastly, that these are all the facts connected with this matter, and that I have withheld nothing.

Sworn at, &c.

Notice of motion to shew cause why a certain proof of debt shall not be expunged.

(Heading.)

A.B. *vs.* C.D.
and E.F., the latter in his capacity as trustee of the insolvent estate of G.H.

Gentlemen,—Take notice that application will be made to this Honourable Court on the . . . . day of . . . . at 10 o'clock in the forenoon on behalf of the above applicant, who is a creditor of, and as such interested in, the said insolvent estate, at which time you will be required to shew cause, if any, why the proof of debt for the sum of £ . . . . tendered by you, the said C.D., to and accepted and ranked by the Resident Magistrate of . . . . at a meeting of creditors of the said insolvent estate, held before him on the . . . . day of . . . . at . . . . shall not be expunged from the minutes . . . . of said meeting and from the list of proofs of debt filed, on the ground that (*here state the cause of objection to the claim, for instance*) the alleged debt represents a joint speculation between the insolvent and the said C.D. in the purchase of certain horses from one I.J., which had all died from the horse-epidemic in the early part of this year, and for which debt they had jointly compromised and settled with the said I.J.; and the said insolvent is in no way liable therefor to the said C.D.

And to shew cause also why you shall not be ordered to pay the costs of this application.

Dated at Cape Town this . . . . day of . . . .

Yours, &c.

. . . . . .

Applicant's Attorneys.

To C.D. of . . . .
and E.F. of . . . ., the latter in his capacity as trustee in the insolvent estate of G.H.

(NOTE.—*The affidavit in support should go to prove the facts in the notice.*

Similar notices and affidavits (varying according to circumstances) may be made on the amendment of a proof: *and all other objections in cases of proofs of debt.*

But if the matter is of such importance that an action has to be brought, then a summons should be issued, or the Court may order the objections to be tried by action and not by motion.)

Summons to amend a proof by changing part of it from a preferent to a concurrent claim, and by having the remaining parts expunged.

(Heading.)

Command &c. . . . . A.B. . . . . of . . . . (hereinafter called the defendant) that within . . . . days after the service of this summons he cause an appearance to be entered in our Supreme Court of our said Colony at Cape Town to answer C.D. and E.F. of . . . . in their capacity as trustees of the insolvent estate of G.H. . . . . of . . . . (hereinafter called the plaintiff) in an action wherein the plaintiff claims: 1st. That the item £450 in the proof . . . . of debt of the said defendant, and the alleged to be for maternal inheritance due to him, may be expunged as a preferent claim and be ranked only concurrently on the ground that the tacit hypothec which the said defendant had on the said insolvent estate for his said inheritance has been novated and thus lapsed by reason of his having accepted promissory notes from his father, the said insolvent, in payment of the said inheritance.

2. That the item £500 mentioned in the said proof of debt be expunged and wholly disallowed, and the defendant be not entitled to prove on the estate or rank for it, on the ground that the promissory note which it represents was intended to be an accommodation note for the benefit of the defendant though signed by his father, the insolvent, as debtor.

3. That the item £100, also represented by another promissory note, be also expunged and wholly disallowed, and the defendant be not entitled to prove, or rank for it, in the estate, on the ground that the said note was given by the insolvent to one I.J. as the result of a gambling transaction between them, of which transaction the said defendant was aware at the time he took over the note for half its amount.

As it is said, &c.

Summons to expunge certain notes for want of due notice of dishonour.

(Heading.)

Command A.B. of . . . . in his capacity as trustee of the insolvent estate of E.F. of . . . . and G.H. of . . . . that within . . . . days after the service hereof they cause an appearance to be entered in our Supreme Court of our said Colony at C . . . . T . . . . to answer C.D. of . . . . a creditor of, and interested in, the said insolvent estate, in an action wherein the plaintiff claims that certain proofs of debt made by the said G.H. on the said insolvent estate shall be expunged and not allowed to be ranked for any part thereof; viz. a promissory note for £ . . . . made by one I.J. in favour of and endorsed by the insolvent, and a certain other promissory note for £ . . . . made by K.L. in favour of M.N. and by the latter and the said insolvent endorsed in blank; on the ground that when the said notes respectively fell due no notice of their dishonour or of either of them, was given to the said insolvent.

And it is said, &c.

Power to prove claim and vote for trustee in insolvent estate.

. . . ., the undersigned, do hereby nominate and appoint Mr. . . . . with power of substitution, to be . . . . true and lawful agent and attorney, for . . . . and in . . . . name to attend all the meetings of creditors in the insolvent estate of . . . . on . . . . behalf, to prove . . . . claim, and to vote for . . . . in the election of trustees or provisional trustees, and generally to act on . . . . behalf at all meetings in the said estate, in all matters and things in which . . . . interests are concerned, and promising to ratify and confirm whatsoever . . . . said agent may do and perform in the premises by virtue of these presents.

Dated . . . ., this . . . . day of 19

Witnesses : . . . . . .

. . . . . .

Affidavit for the proof of an unsecured debt by an agent.

In the insolvent estate of A.B. of . . . .

C.D. of . . . . book-keeper to E.F. of . . . . maketh oath and saith, that A.B. of . . . ., whose estate has been placed under sequestration in the hands of the Master of the Supreme Court, was, at the issuing of the order for the sequestration thereof, and still is, justly and truly indebted to the said E.F. in the sum of £ . . . . for (goods sold and delivered) according to the account hereunto annexed ;[1] and this deponent further saith that no other person besides the said insolvent is liable for the said debt, or any part thereof, and that he hath not, nor hath any other person, to his knowledge, for the use of the said E.F., received security for the same, or any part thereof.

Sworn this . . . . day of . . . .

Before me . . . .

Affidavit for the proof of debt on a promissory note or bill of exchange.

In the insolvent estate of A.B. of . . . .

C.D. of . . . . maketh oath and saith, that A.B. of . . . ., whose estate hath been placed under sequestration in the hands of the Master of the Supreme Court, was, at the issuing of the order for the sequestration thereof, and still is, justly and truly indebted to . . . . in the sum of . . . . for . . . ., according to the account hereunto annexed ; and this deponent further saith that he hath not, nor hath any other person, to his knowledge, or for the use of . . . . received any security for the said debt, or any part thereof, save and except the following promissory note (or bill of exchange) :

Date of bill or promissory note.	By whom drawn.	By whom accepted.	To whom payable and when.	By whom endorsed.	Amount.

[1] *Note.*—This account must be specified, and show the dates of the various transactions.

And this deponent further saith, that besides the said insolvent, the endorser abovementioned . . . . liable to this deponent for the amount of the bill or note endorsed by . . . . as aforesaid.

And this deponent lastly saith, that the aforesaid bill of exchange or promissory note, produced by . . . . in proof of . . . . debt aforesaid, ... in all respects genuine and true. . . . .

Sworn this . . . . day of . . . .

Before me, ...

Affidavit for the proof of debt on a mortgage bond.

In the insolvent estate of A.B. of . . . .

C.D. of . . . . maketh oath and saith, that A.B. of . . . ., whose estate has been placed under sequestration in the hands of the Master of the Supreme Court, was, at the issuing of the order for the sequestration thereof, and still is, justly and truly indebted to . . . . in the sum of . . . . together with the interest thereof, reckoned at the rate of . . . . per cent. per annum, from the . . . . day of . . . . upon and by virtue of the bond hereunto annexed, passed by the said insolvent on the . . . . day of . . . . before . . . . under special hypothecation of . . . . and for the payment of which . . . . are jointly liable with the said insolvent.

And this deponent further saith that he values the said security at the sum of . . . . and that he hath not, nor hath any other person, to his knowledge, for the use of . . . . received any other security whatever for the said debt or any part thereof.

And this deponent lastly saith, that the bond aforesaid, produced by him in proof of his debt aforesaid, is in all respects genuine and true.

Sworn this . . . . day of . . . .

Before me, ...

Affidavit for proof of debt for rent.

In the insolvent estate of A.B. of . . . .

C.D. of . . . . maketh oath and saith, that A.B. of . . . ., whose estate has been placed under sequestration in the hands of the Master of the Supreme Court, was, at the issuing of the order for the sequestration thereof, and still is, justly and truly indebted to . . . . in the sum of . . . . for rent for the hire of the house . . . . situated in . . . . being for the months of . . . . and . . . . according to the account hereunto annexed; and this deponent further saith that no other person besides the said insolvent is liable for the said debt, or any part thereof, and that he hath not, nor hath any other person, to his knowledge, for the use of deponent received security for the same, or any part thereof, save and except the tacit hypothec or lien which deponent has and claims on the furniture and other articles in the said house; and deponent values such articles and furniture at £ . . . .

(NOTE.—*Some value should be put on the goods in the house, and if this cannot be done, a good reason should be given, or a value should be put on as near as can possibly be ascertained from information.*)

Sworn this . . . . day of . . . .

Before me, ...

Affidavit for proof of debt for repairs to a waggon which is detained for the lien.

In the insolvent estate of A.B. of . . . .

C.D. of . . . . maketh oath and saith, that A.B. of . . . ., whose estate has been placed under sequestration in the hands of the Master of the Supreme Court, was, at the issuing of the order for the sequestration thereof, and still is, justly and truly indebted to deponent in the sum of . . . . for repairs to a certain spring waggon, according to the account hereunto annexed; and this deponent further saith that no other person besides the said insolvent is liable for the said debt, or any part thereof, and that he hath not, nor hath any other person, to his knowledge, for the use of deponent received security for the same, or any part thereof, save and except that this deponent has detained and still has in his custody the said waggon on which he claims a preferent lien for his repairs as aforesaid; and which said waggon he values at the sum of £ . . . ., and he is willing and hereby offers to give it up to the trustee of the said insolvent estate to be realized subject to deponent's lien.

Sworn this . . . . day of . . . .

Before me, ...

(NOTE.—*This form will serve as a guide to all parties who claim a lien on a thing in their possession.*)

CHAPTER XXXVIII.

PERMANENT TRUSTEES: THEIR ELECTION AND REMOVAL.

WHILE provisional trustees are appointed by the Court, permanent trustees are elected by the creditors. There may be any number of provisional trustees, though the Court is, as a rule, averse to appointing more than one, unless a second or even a third should be absolutely necessary owing to the size of the estate or its being split up in different localities; but the creditors can elect no more than three permanent trustees.[1]

The election of a trustee is at the second meeting of creditors, unless the estate is under £75 in value, when it is at the first meeting duly called by the Master.[2] Every creditor, no matter how small is his claim, can prove it on the estate, but he cannot vote in the election of a trustee, unless his claim amounts to over £30.[3] Nor can a person vote in the election of a trustee if his claim depends upon a *contingency* or an uncertain condition, so long as that contingency does not occur or the condition is unfulfilled.[4] But in an instance where none of the claims proved amounted to £30 the Court held it to be a *casus omissus* in the Ordinance and confirmed the decision of the Magistrate who declared elected as trustee the nominee who had the majority in value.[5] When there is a competition for the office of trustee, the choice shall fall upon the one who receives the votes of the majority of creditors present and entitled to

[1] § 40, Insol. Ord.
[2] § 25.
[3] § 38.
[4] § 31.
[5] *Re Est. Du Toit*, 12 S. C., 162.

vote, who represent not only the greater number among themselves, but also the greater value of claims in the aggregate.[1] *If the greater number do not represent the greater value as well, there must be a fresh election.* It does not matter whom the Master or the Magistrate may erroneously declare elected; there will in such a division of votes be no election.

In such a case the matter must be reported to the Court, who will order a fresh election, unless there is sufficient proof before it that a fresh election will have a similar result; in which case the Court can, in its discretion, either appoint any one of the competing trustees, or an outsider, with full powers to administer and liquidate the estate.[2] If any person has an objection to make to the election of a trustee, he should do so within *two* days thereafter by notice, in writing, of the particulars of his complaint to the Master, or the Magistrate, before whom the meeting was held. And he must follow up his objections, as soon thereafter as possible, by bringing the election under the review of the Court, who shall decide thereon as the justice of the case may require.[3]

In case no creditors appear either at the first or second meeting of creditors, the order of the Court is not necessary, but the Master has full authority to call the fresh meetings under the 25th section of the Ordinance, but when there has been a failure only to elect a trustee the Court will authorize the Master to call a meeting for that purpose.[4]

The following persons are *prohibited* from being trustees, and, if elected, their election is void,[5] viz.: (*a.*) The insolvent himself. (*b.*) Those related to him within the fourth degree. (*c.*) A minor. (*d.*) An unrehabilitated insolvent. (*e.*) A person not resident within the jurisdiction of the Court. (*f.*) A person whose interest is opposed to the general interest of the creditors.[6] (*g.*) A person who is privy to the intentional omission of a creditor's name from the insolvent's schedules,

[1] § 40, Insol. Ord.

[2] *Graham and Oxer* vs. *Caldecott*, B. for 1876, p. 4; *re Lyons Brothers* and *re Tull*, 2 J., 136 and 369.

[3] § 40.

[4] *Ex parte Garlick and Ruddle*, 4 C. T., 10; and *re Est. Coetsee*, 12 S. C., 423.

[5] §§ 41 and 42.

[6] *Turner & Co.* vs. *Schaefer*, 2 J., 101.

with the view to obtain an advantage thereby. (*h.*) A person who promises a consideration to a creditor for his vote. (*i.*) A person who promises to abstain from investigating some one or other transaction of the insolvent. (*j.*) A person who divides the debts, so as to increase the votes. (*k.*) A person who undertakes to share the commission in return for a vote. For any of the offences for which a trustee may be removed from his office the Court can, in removing him, also declare that he shall be incapable of being again elected a trustee.[1]

Even if the Court should already have confirmed the election of a trustee, his election can be set aside, upon application to the Court, by anyone interested in the estate, on the grounds above set forth; or upon the ground that the election was fraudulently or unduly made.[2]

When there is no objection to an election of a trustee the Master reports this to the Court, who thereupon confirm the election. So also has the Supreme Court confirmed the election of a trustee in Griqualand West for the purpose of enabling him to dispose of certain landed property in this Colony but beyond the jurisdiction of the High Court of Griqualand West, who appointed him.[3] In case of the removal of a trustee lawfully elected, another must be elected in his stead, unless permission is given by the Court for the remaining trustee (if there is one) to liquidate the estate. But in order to remove a trustee on the ground that he has left the Colony, notice of the application should be given to him, or the Court may give directions as to the service of such a notice, or the publication in a newspaper (in case there can be no personal service), and it may grant such an application with costs against the defaulting trustee.[4]

A trustee may also be removed from his trust, on the ground of his insolvency, or for any misconduct in his trust.[5] It is a misconduct where a trustee did everything in his

[1] § 42.
[2] § 40.
[3] *Re O'Connel*, 10 J., 62, and *re Coëtzee*, 11 C. T., 225.
[4] *Est. McDonald*, decided 1888, and *Est. Van Niekerk*, decided 1889, neither of which is reported; *re A. B.*, B. for 1868, p. 250; *re Est. Van Rœnen*, 1 C. T., 285, and *re Est. Morrison*, Ibid, 286.
[5] §§ 52 and 81.

power to obstruct the sale of an estate and prevent it being a success, as the first duty of a trustee is to advance the interests of the estate which he administers.[1] In the case of *Edmeads* vs. *Archer*[2] the Supreme Court held that it had no discretion, but must remove a trustee on the ground of insolvency, if application is made to that effect by any creditor, and notice of the application must be given to him also.[3]

A trustee may resign his trusteeship, but it is entirely in the discretion of the Court to accept his resignation or not. If satisfactory reasons be given, such as serious continued illness, or contemplated absence from the Colony, and if he has rendered proper accounts of his administration, the Court may accept it, after due notice to the creditors, either at a meeting of creditors duly called for that purpose,[4] or by the publication of a rule *nisi* in the *Gazette* calling for objections to the resignation tendered.[5]

The Master calls a first or second meeting at which a trustee is to be elected, but in the case of the death, or other removal, or absence, of a trustee, no fresh meeting for the election of another trustee can be called without the leave of the Court;[6] and where a meeting has been called for the proof of debts and the election of a trustee, but none has been elected, the Court will direct the Master to call a special meeting for the election.[7] The creditors applying for such an order do so at their own expense, and must pay also the expense in connection with the meeting and election.[8]

It is only for a trustee, and not for a creditor, to bring an action for undue preference.[9] If the trustee will not institute that or any other action, it is then a matter for the Court to decide.[10] The trustee can bring the action without the sanction of the creditors.[11]

[1] *Hall and another* vs. *Fitzgerald*, 12 S. C., 277.
[2] 3 J., 241.
[3] *Re Junker*, B. for 1868, p. 21.
[4] § 116.
[5] *Re Est. Wolstenholme*, 1 C. T., 346.
[6] §§ 42, 52, 81; *re Home, Eager & Co.*, 2 S., 208; *re Cloete*, 1 J., 85; and *re Conradie*, 1 C. T., 96.
[7] *Re De Villiers*, 8 J., 71.
[8] *Re Garlick and Ruddle*, 4 C. T., 10.
[9] *Trustee of the S. A. Bank* vs. *Wilson and another*, 4 J., 172.
[10] *Du Plessis* vs. *Du Plessis' Trustees*, 5 J., 220.
[11] §§ 50 and 84 of Insol. Ord. and *Trustee of Wilson and Glynn* vs. *Wilson and another*, 4 J., 209.

Any person can prove a debt without producing a power to that effect, but he cannot vote in the election of a trustee without a special power.[1]

Petition for the appointment of a permanent trustee owing to the failure of an election.

(Heading.)

The petition of the undersigned creditors of the insolvent estate of A.B. of . . . .

Humbly sheweth :—

1. That the said estate was surrendered as insolvent on the . . . . day of . . . ., and that on the . . . . day of . . . . C.D. of . . . . was duly appointed by this Honourable Court as its provisional trustee.

2. That at the meeting of creditors of the said estate, held on the . . . . day of . . . . before the Resident Magistrate of . . . . for the proof of debts, and the election of trustees, E.F. . . . . was duly proposed as one of the trustees of said estate by creditors numbering (seven) and representing value to the sum of (£15,000) and G.H. was also duly proposed to be one of the trustees of said estate by only (three) creditors, but representing value to the amount of (£27,000).

3. That before the meeting of the creditors took place, and anticipating a competition for the office of trustee, several of us made an attempt to get the two gentlemen who were ultimately proposed to act as joint trustees of the estate, if elected ; but the (three) creditors who represented value, and not number, objected to this, and insisted upon having their own nominee as sole trustee.

4. That we are quite certain from the stand taken up by the said (three) gentlemen, a fresh election, if ordered by this Honourable Court, would end with the same, or a similar, result, and would be a useless expense and delay, and cause serious injury to the estate.

Wherefore your petitioners humbly pray that, instead of ordering a fresh election, your Lordships will be pleased to appoint either the said E.F. alone, or jointly with the said G.H., as trustees of the said insolvent estate, with full powers to liquidate the same to the final end and determination thereof :

Or, to grant your petitioners such further or other relief in the premises as the justice of the case may require.

And your petitioners as in duty bound will ever pray.

(*Affidavit of Verification.*)

[1] § 39.

Notice of motion to set aside the election of a person who is debarred from being a trustee.

(Heading of application.)

Sir,—Take notice that this Honourable Court will be moved on . . . . day of . . . . at 10 o'clock in the forenoon on behalf of the above applicant, who is a creditor and interested in the estate of E.F. . . . . of . . . ., at which time you will be required to shew cause, if any, why your election, on the . . . . day of . . . . as sole trustee of the said insolvent estate, shall not be set aside and declared void, on the ground that (*here state any of the causes mentioned in the Insolvent Ord. as, for instance*) you are a brother-in-law of the said insolvent, being married to a sister of his, and thus within the fourth degree of relationship, by affinity, and therefore disqualified. And to shew cause, further, why you shall not be ordered to pay the costs of this application.

Dated at . . . . this . . . . day of . . . .

Yours, &c.

. . . . . .

Applicant's Attorneys.

To C.D.,
The above respondent,
of . . . .

(NOTE.—*A short affidavit in support of the facts contained in the foregoing notice should accompany it.*)

Petition for the removal of a trustee, owing to his absence from the Colony, and for leave to the remaining trustee to liquidate the estate as if he were sole trustee.

(Heading.)

The petition of . . . . A.B. . . . . of . . . .
Humbly sheweth :—

1. That on the . . . . day of . . . . C.D. of . . . . and your petitioner were duly elected trustees of the insolvent estate of E.F. of . . . . and were, on the . . . . day of . . . ., confirmed in their election by this Honourable Court.

2. That all the movables in the said estate have been sold by public auction, and also a portion of the immovables; but that on or about the . . . . day of . . . . the said C.D. left this Colony for (Europe) apparently on a temporary visit, but his return, if at all, is now uncertain, and your petitioner cannot proceed with the final liquidation of the said estate while the said C.D. is absent from the Colony.

Wherefore your petitioner humbly prays that your Lordships may be pleased to remove the said C.D. from his said trust, and to allow your petitioner, as sole trustee, finally to liquidate the said estate.

And your petitioner as in duty bound will ever pray.

(*Affidavit of Verification.*)

(NOTE.—*A notice of motion, with a copy of this petition, should be served on C.D. intimating that the Court will be moved on a day to be named in the notice in terms of the prayer of this petition. If no such notice has been given, then the Court will grant a* rule nisi *on this petition, to be served on C.D. if possible, to be heard in answer to it on a specified day.*)

Petition for leave to resign as trustee.

(Heading.)

The petition of A.B. . . . of . . . .
Humbly sheweth :—

1. That your petitioner was on the . . . . day of . . . . duly elected as sole trustee of the insolvent estate of C.D. of . . . .

2. That the greater part of the said estate has been liquidated, and accounts thereof filed with the Master, and confirmed by this Honourable Court; and the creditors have been paid the dividends awarded to them, as per their vouchers also filed with the Master.

3. That the only assets still in the estate are (*here specify them, and state why they have not been realised*).

4. That at a meeting of creditors duly called and held before the Magistrate of . . . . on the . . . . day of . . . . no opposition was offered (*or if offered, state the nature of the objection*) to your petitioner resigning his trusteeship of said estate.

5. That your petitioner is desirous of going to (Europe) for (six) months, and intends, for that purpose, to leave the Colony on or about the . . . . inst., and he is therefore desirous of resigning his trusteeship of the said estate.

Wherefore your petitioner humbly prays that your Lordships may be pleased to allow him to resign the office of trustee of the said insolvent estate; and that your Lordships may further be pleased to discharge and acquit him of the said trust.

And your petitioner as in duty bound will ever pray.

(*Affidavit of Verification.*)

CHAPTER XXXIX.

ACCOUNTS OF TRUSTEES, AND THEIR CONFIRMATION.

EVERY trustee of an insolvent estate must, within six months after his appointment, "frame and lay before" the Master of the Supreme Court an

"exact account and balance of the said estate, containing the proceeds "of all sales and debts then collected, and an account of all debts still "outstanding, and an inventory of all property and effects still unsold, "and also all debts due by the said estate; and shall also form a general "plan for distribution of the assets of the said estate, specifying firstly "such creditors as are preferent by law in the order of their legal "preference, and secondly, the concurrent creditors, and as near as may "be the probable balance which will remain for division amongst them."

If the usual place of residence of the insolvent be in any district other than Cape Town and the divisions thereof, such account and plan of the trustee shall first be laid before the Resident Magistrate of that district, for the inspection of creditors, at least seven days.[1] Every account and plan for distribution shall lie open at the Master's office for the inspection of creditors for a period not less than fourteen days.

The account must be duly advertised in the Government *Gazette*, that it will lie for inspection at the place and period aforesaid.[2] No trustee may delay the filing of his account beyond six months, without special leave obtained from the Supreme Court, upon good cause shewn to the satisfaction of the Court. The Court will then extend the time for filing the account, according to the circumstances and magnitude

[1] § 108. [2] § 109.

of the estate; but unless a satisfactory reason be given it will not extend the time. The trustee should petition the Court for such extension of time, and should not wait till he is forced to do so by any creditor; otherwise he runs the risk of having to pay, *de bonis propriis*, the costs of such creditor's motion, and may also declare him to have forfeited, or not, his commission.[1] But the Court may and has refused to make a trustee pay costs *de bonis propriis*, where he has delayed filing his account *bonâ fide*.[2] Every creditor of an estate can bring such motion before the Court; and so also can the insolvent himself; and also the Master of the Supreme Court.[3]

The trustee need not wait till he can file a full account, but he should file such account as he can, as far as his administration has gone: nor need he wait till the six months are expired, but may file some or all of his accounts as soon as he can; the sooner the better.[4] A trustee failing to file his account within the time ordered by the Court is liable to be attached and imprisoned and otherwise punished for contempt of Court.[5]

The account having been duly advertised for inspection, and lodged as above directed, any creditor of the estate, or any other person interested in the estate, or the insolvent,[6] who feels aggrieved, may enter his objection in writing with the Master, stating the ground of his objection to the account of the estate and plan for distribution;[7] but anyone objecting to the account should, if a reasonable time has elapsed to enable the trustee to amend it, or if the trustee should at once decline to amend it, approach the Supreme Court, by motion calling upon the trustee to shew cause why the account and plan of distribution should not be altered or amended in terms of his objection.

The Court will then, according to the circumstances of each case, decide on the motion, and, if necessary, may order the parties to file pleadings, and proceed with the objection

[1] *De Jongh* vs. *Lindenberg*, 4 J., 310.
[2] *Standard Bank* vs. *Booysen's Trustees*, 5 J., 100.
[3] §§ 108 and 110, and Act 38 of 1884, § 15; *Norden* vs. *Brink*, 2 M., 270.
[4] *London and South African Bank* vs. *Stratford's Trustees*, B. for 1875, p. 123; *re Matthews*, 3 G., 63.
[5] *Re Maskell*, B. for 1873, p. 28.
[6] *Re Roberts*, 2 C. T., 139.
[7] § 110.

by regular action. If, whether on the motion or on the action, the Court should materially alter the account and plan, whereby the interest of any party, who has not been before the Court, is affected, the amended account must be advertised for inspection as before.[1] The objections to accounts are various and numerous, and may go to the root of every transaction, instead of challenging them, on the "Proofs of Debt" being filed. Every objection which could have been made on the "Proof of Debt" may be allowed by the Court to be made to the account and plan of distribution, so long as the account has not been confirmed by the Court; but it is preferable that a person, when he is aware of a good objection to a Proof of Debt, should take proceedings at once, or within a reasonable time thereafter, for the expunging or amendment of the Proof, instead of waiting till the account is filed. An early proceeding saves time, and perhaps also expense, to the objecting party as well as to the estate.

If the creditor who lodges the objection does not proceed within a reasonable time to lay it before the Court, the trustee of the estate may approach the Court, by motion, to have the objection expunged and the account confirmed. But in doing so the trustee should shew to the Court that the objections are wholly invalid or not good.[2]

The trustee can file as many accounts as the occasion may require. It is a sign of his activity if he files an account as soon after his appointment as possible, and as often thereafter as he collects funds for distribution; and he should liquidate and close the estate as soon as he reasonably can, without waiting for the six months' grace allowed him by law.

It is only when this cannot be done within the six months, without detriment to the estate, that he should petition the Supreme Court for an extension of time. But the "Account and Plan of Distribution" mentioned in the 126th section of the Insolv. Ord. is the *first account and plan of distribution;* whatever the insolvent may acquire *after* the confirmation of that account, no matter how or from what source, belongs to

[1] §§ 110 and 111.

[2] § 111; *re Blanckenberg*, 1 M., 477; *Anderson's Trustees* vs. *Cairncross*, B. 1878, p. 5; *Exors. Lamprecht* vs. *Mairing*, decided in 1872, not reported; *Roberts's Trustee* vs. *Roberts*, 3 C. T., 223.

him, and not to his insolvent estate. Thus in the case of the *Trustees of Ras* vs. *Executor of Klerck*[1] the Court said :—

"when once an account and plan of distribution (that is, the first account) "was confirmed, the insolvent was entitled to acquire anything that "came to him.[2] The first account only is called the plan of distribution; "if more than one account is filed, it is called a scheme of distribution, "and not an account and plan of distribution, and it is the *first* account "which settles the right of the insolvent."

Thus in the estate of *Ras*, though three accounts had been filed by the trustee before the question, which the above case settles, was mooted, the insolvent was declared *entitled to the inheritance which vested in him after the confirmation of the first account.*

If there is no objection lodged to a trustee's account, and if he fails or neglects to get it confirmed, then any creditor or any other person interested in the estate may approach the Court, on motion, calling upon him to shew cause why he should not forthwith have the account and plan confirmed.[3]

As the third meeting of creditors is to be appointed immediately after the confirmation of the election of trustees, it follows that no accounts can be confirmed until the third meeting of creditors shall have been held;[4] unless, of course, where the assets of the estate are under £75, when only the first and final meeting is held.

As no second or subsequent surrender (whether voluntary or compulsory) can be entertained, till the *final account* of an insolvent's former estate has been confirmed, and also as it is in the discretion of the Court to refuse or suspend a rehabilitation till the insolvent's whole estate has been administered and all accounts confirmed, it is important to know what is meant by a "final account."[5] In the case of the *Trustees of the Stellenbosch Bank* vs. *Herold*,[6] the Chief Justice said :—

"The term 'final liquidation account' is always used to denote the "last account which is filed after all the available assets of the insol-"vent's estate have been collected and all the legal remedies for such "collection exhausted."

[1] 7 J., 113.
[2] § 114.
[3] *Executors Lamprecht* vs. *Estate Marnewick*, decided in 1872, not reported.
[4] § 77.
[5] § 128; and *Alford and Wills* vs. *Townshend*, 4 J., 153.
[6] 1 F., 6.

So long as an account, though confirmed, is not the final one, and where an obvious mistake has been made by a trustee crediting the estate with money not yet received, the Court may allow him to rectify the error in the next account;[1] but this was peculiar, and only allowed under the special circumstances.

But an account can be confirmed subject to any alteration that may be made and brought up in the next account.[2]

Accounts can always be amended so long as they have not been confirmed.[3]

The Court can refuse to confirm an account upon the face of which a document which should have been stamped appears unstamped.[4]

The unconfirmed liquidation account of an insolvent estate is not a final sentence, though framed in terms of an order of Court;[5] nor has a trustee's plan of contribution the effect of *res judicata* as against creditors who have proved and are liable to contribute *pro rata* towards the expense of administration.[6]

A trustee cannot be sued for a debt due by an estate before a liquidation account has been filed and confirmed, though for a preferent claim.[7]

A trustee, in the absence of a resolution of creditors to the contrary, can claim no more than his commission, not even for travelling expenses; nor can he charge as auctioneer. *The Court has frequently held that his commission must cover all his trouble and travelling and hotel expenses.* He cannot charge for his personal travelling expenses, nor for cart- or horse-hire,[8] unless it be absolutely necessary and for the benefit of the estate that he should be present at the given destination;[9] and then he can charge only the actual disbursement he had to incur in travelling. He cannot charge

[1] *Re Cerfontein*, ex parte *Barry and another*, 4 J., 157.

[2] *Re Est. Black*, decided in 1870, not reported.

[3] *Re Est. Dryer*, B. for 1868, p. 246; and *Botes* vs. *Meir's Trustee*, 1 J., 28.

[4] *Colonial Government* vs. *Smith's Trustee*, 9 J., 285.

[5] *Nisbett and Dickson* vs. *Richardson*, 1 M., 298.

[6] *Steyn's Trustee* vs. *Gous*, 4 C. T., 356.

[7] *Tiffen* vs. *Harsant*, B. for 1876, p. 50.

[8] *Re Est. Smith*, decided 1870, not reported.

[9] *Est. Marsh*, decided in 1870, not reported.

the travelling expenses for attending the sale of an estate, or for seeing after standing crops or the books of the insolvent;[1] nor for attending the examination of an insolvent; nor for his attendance at the criminal trial of the insolvent. He can charge only the Government for his usual expenses as a witness.[2] But where a trustee had to attend a meeting of creditors at a place other than where he lived, cart hire was allowed him, under the peculiar circumstances of the case.[3] Therefore *if a trustee wishes to be paid anything beyond his usual commission, such as for necessary disbursements, he must either, before incurring such expenses, get a resolution of creditors authorising him to incur them; or, if already incurred, he must get a resolution of creditors ratifying such expenses.*[4] But though the creditors may indemnify him for any disbursements he has been obliged to make, *they cannot vote him any remuneration beyond the commission allowed by law*, as this would be contrary to public policy, and thus illegal. If, then, the creditors, at a duly constituted meeting, specially sanction the extra disbursements or expenses of a trustee (which resolution must appear in the minutes of the meeting), the Court will not interfere.[5]

The trustee can take notice of and rank in his own account, and pay, certain charges without requiring "proof of debt," such as:—

(*a*) Making up the schedules of the estate, and the appraisement of the estate, both of which are to be taxed at the discretion of the Master, who must judge as to the bulk of the schedules, or extent of the assets to be appraised; but in no case can he allow less than 10*s.* 6*d.* for each.

(*b*) The attorney's fee for handing in the schedules, and seeing them lodged with the Sheriff, and his necessary correspondence therein, is £1 1*s.* This item is fixed by a Rule of Court, and does not require to be taxed. The attorney is

[1] *Est. de Kock*, decided in 1871; and *Est. Weymars*, also decided in 1871, neither of which is reported.

[2] *Est. Wentzel*, decided in 1871, not reported.

[3] *Bland* vs. *Eksteen's Trustee*, 1 F., 103.

[4] *Re De Kock's Estate*, B. for 1868, p. 252; and *re Richard and Ochse*, decided February, 1869, not reported.

[5] *Est. Brown*, decided in 1871, not reported.

allowed, in addition, the necessary stamps he had to affix to the schedules.

(*c*) The taxed costs for the compulsory sequestration of an estate.

(*d*) The taxed costs for the appointment of a provisional trustee.

(*e*) The Master's fees attendant upon a surrender of an estate.

(*f*) The fee of the messenger to take an inventory of the estate, and to take charge thereof when necessary.

(*g*) Expenses for advertising and calling meeting of creditors; but when any creditor has failed to prove his claim, and wants a special meeting called for that purpose, he should prepay the expenses out of his own pocket, as he is not entitled to prove for them.

(*h*) Expenses for advertising the accounts for the inspection of creditors, etc., and for binding them, and advertisement afterwards to creditors calling upon them to receive their dividends.[1]

(*i*) The usual charges for advertising and for the confirmation of an account, which are one guinea to the attorney, to include all his necessary correspondence and attendances, which are not taxed, as they are fixed by the Court; *plus* the necessary stamps he had to pay, and also what he had to pay for binding the account, and for advertising it for inspection of creditors.

(*j*) Every bill of costs of an attorney, other than those excepted as above from taxation in connection with the working of an estate, must be taxed, before the accounts of the estate can be confirmed. But if it has nothing to do with the working of the estate, and not incurred by the trustee, it must be proved in the usual way.

(*k*) The trustee's own commission or remuneration for the administration of the estate, which is 2½ per cent. upon the proceeds of immovable property for the first £1,000, or under, and for every following £100 or fraction thereof, 1½ per cent. Upon the proceeds of movable property for the first £1,000, or under, it is 5 per cent., and for every following £100, or

[1] § 115.

fraction thereof, 2½ per cent.[1] In the case of a provisional trustee, who has collected certain moneys, he is also entitled to remuneration upon the same scale as a permanent trustee for the work he has done; but the charge cannot be made over again by the permanent trustee, whoever he may be.[2]

For further examples of what the trustee may pay without requiring "proof of debt," see towards the end of the Chapter "*Proofs of Debt.*"

When a trustee conceives that his account is completed, he should advertise it for the inspection of creditors and all others concerned. The advertisement should state from and to what date the account will lie for inspection at the local Magistrate's office, and at the Master's office. Vouchers should accompany the account for all payments made by the trustee, with the view of filing them with the account when confirmed.

Every account should be in order, correct, and complete, and examined and certified by the Master to the effect that there are no objections thereto, before it can be presented for confirmation.

If objections are lodged to the confirmation of the account, which may be done at any time before its confirmation,[3] they must be prosecuted or disposed of, as hereinbefore mentioned. If no objections are lodged by a creditor, or by the insolvent, the Master may still have some objection. If there are no objections from any quarter to the account, or if all the objections lodged have been met, or removed, or withdrawn, then the Master, on any Court day, personally reports to the Court that there are no objections to the confirmation of the account, and formally prays for its confirmation. It is only upon such confirmation of the account that all dividends awarded are payable. If a trustee pays out any dividend before the confirmation of the account, he does so at his own personal risk and loss. Of course if there are certain preferent charges on the estate which cannot be disputed and which need not be proved, the trustee may pay them, without waiting for the confirmation of the account;

[1] § 13, Act 38 of 1884.
[2] *Re Est. Louis Stock*, B., 1878, p. 53.
[3] § 111.

but no "proof of debt" can be paid, or any part thereof, until the confirmation of the account. For whatever dividends are paid a receipt should be obtained by the trustee, and filed with the account, as no rehabilitation will be granted to any insolvent until all dividend-receipts have been filed with the Master.

The confirmation of the account and plan for distribution has the effect of a final sentence of the Court;[1] and the trustee is bound upon the demand of any creditor to distribute the estate. If he fails to do so, he may be compelled, by motion, by any creditor to whom a dividend has been awarded,[2] as the confirmation has the effect of a decree in favour of the creditor for the debt for which he has been ranked;[3] and of course he may issue a writ at once, or serve notice of motion to shew cause why the amount awarded should not be paid forthwith.[4] The Court may in its discretion, and usually does, refuse to set aside or reopen an account which has been confirmed, even though a creditor for a preferent claim may have had no knowledge that the account and plan of distribution were open for the inspection of creditors, and were duly advertised and afterwards confirmed by the Court. But the Court has the right to set aside a confirmation on any of the grounds upon which a *restitutio in integrum* would be granted by our law, such as fraud, or any other just ground.[5]

When an account has been duly confirmed, the trustee must give notice thereof, and that the dividends awarded are payable. These dividends must be drawn within *six* months from the day of notice, failing which, whatever dividend is unpaid must be paid into the Guardian's fund, to the credit of the creditor to whom it has been awarded; and if the trustee fails to do this, he is liable to a penalty to the Colonial Treasury, to be awarded by the Supreme Court, equal in amount to the dividend retained by him. The Master may sue both for the unpaid dividend and for the fine.[6]

[1] § 112; *Nisbett and Dickson* vs. *Richardson*, 1 M., 298; and *re Du Plessis*, 1 R., 326.

[2] § 113.

[3] *Storm* vs. *Breda and De Lima*, 1 M., 476.

[4] § 113, and *Exors. Kunhardt* vs. *Lucas*, 1 R., 349.

[5] *Stewart's Assignee* vs. *Walls' Trustee*, 3 J., 243; and *Harris* vs. *Prince & Co. and Norden*, 2 S., 83.

[6] § 115.

After the confirmation of his accounts the trustee may, by leave of the Court, resign his office, if no objection thereto be lodged.[1]

A liquidation account, when confirmed, is *res judicata* only as to the assets awarded and distributed; and an insolvent is entitled to oppose a decree for civil imprisonment by objecting to the legality of the claim proved in his estate.[2]

If there are not sufficient assets in the estate to pay for the expenses of administration, the trustee can claim a *pro rata* contribution from all those creditors who have proved on the estate.[3] This claim should be by summons.

The misappropriation, or misapplication, by one of the co-trustees, of any part of the assets of an insolvent estate does not free the other trustees from personal liability for the whole amount so made away with.[4]

If any one of the co-trustees refuses to join the other or others in signing the Account and Plan of Distribution, or to get an objection opposed or removed, or to get the account confirmed, or to pay out dividends, or to do any other act which requires the joint action, consent, or co-operation of the trustees, he may be compelled to do so by the remaining trustee or trustees.

Notice of motion calling on a trustee to file his account.

(Heading.)

Between A.B.
Applicant,
and
C.D. in his capacity as sole Trustee of the Insolvent Estate of E.F.
Respondent.

Sir,—Take notice that application will be made to the Honourable the Supreme Court on .... the .... day of .... at 10 o'clock in the forenoon, or so soon thereafter as counsel can be heard, on behalf of the above applicant, who is a creditor of and interested in the said insolvent estate, and at which time you will be required to shew cause, if any, why you shall not be ordered forthwith to frame and lay before the Master of the said Court an exact account and balance of the said

[1] § 116, and *Est. Wolstenholme*, decided January, 1892, not reported.
[2] *Villiers* vs. *Le Riche*, 1 M., 518.
[3] *Steyn's Trustee* vs. *Gous*, 4 C. T., 356.
[4] *Re Crouse*, 3 M., 257.

estate, supported by proper vouchers; as also a general plan for distribution of the assets of the said estate in conformity with the 108th section of Ordinance No. 6 of 1843; and also, further, why you shall not be ordered to pay the costs of this application.

Dated at Cape Town this . . . . day of . . . .

Yours, etc.

. . . . . .

Applicant's Attorneys.

To

C.D.

Trustee of the Insolvent Estate of E.F.

Graham's Town,

The above Respondent.

Affidavit to accompany preceding notice.

In the Supreme Court,

etc., etc.

Between A.B.

Applicant,

and

C.D. in his capacity as sole Trustee of the Insolvent Estate of E.F.

Respondent.

I., A.B., of Cape Town, attorney for the applicant in the above case (or clerk to G.H., attorney for the applicant, in the above case), make oath and say :—

That upon application at, and on reference to, the books, in the office of the Master of this Honourable Court, it appears that C.D., the above respondent, was, on the . . . . day of . . . ., appointed sole trustee of the said insolvent estate, and that from that time up till now, a period of . . . . (months), he has filed no account with the said Master of his administration of the said estate.

A.B.

Sworn at . . . .

this . . . . day of . . . .

Before me,

. . . . . .

Petition to the Court by a trustee for an extension of time within which to file his account.

(Heading.)

1. That your petitioner was confirmed by this Honourable Court on the . . . . day of . . . . in his election as sole trustee of the said insolvent estate.

2. That the assets of the said estate (*state what assets could not yet*

be realised, and why not, and set forth other grounds, if any, why the estate could not be liquidated within the six months from the day of appointment by the Court, for instance) consist *inter alia* of three farms situate in this Colony named .... in the district of ...., and .... named .... situate in the district of ...., and that owing to the drought in these districts during the last eleven months no reasonable offer could be expected for the sale of these farms; and that it is deemed advisable to postpone the sale thereof for at least another four or six months, in the hope that with the return of a good season a better price may by that time be obtained than is possible now.

3. (or: *another reason in lieu of preceding paragraph*) That the only tangible asset in the estate consists (of certain printing machinery with the necessary appurtenances, valued at about £1,200, which machinery was claimed by K. as his property, and he has now an action pending in this Honourable Court for a declaration of rights as to the ownership thereof, and which said action, owing to some of the witnesses residing abroad, cannot be decided until the .... Term).

4. Wherefore your petitioner humbly prays that your Lordships may be pleased to grant him a further period of (....) months within which to file his liquidation and distribution account of said estate.

And your petitioner, &c.

(*Affidavit of Verification.*)

Notice to creditors that account will lie for inspection.

In the insolvent estate of ....

The .... liquidation and distribution account in the above estate will lie for the inspection of creditors at the office of the Master of the Supreme Court for a period of fourteen days, reckoned from the ...., after which, should no objection be raised thereto, the Supreme Court will be moved to confirm the same and order the distribution.

.....
Trustee.

Notice to trustees to have liquidation and distribution accounts confirmed, and to pay out awards, &c.

In the Supreme Court,
&c., &c.

Between A.B.
Applicant,
and
C.D. in his capacity as sole trustee of the Insolvent Estate of E.F.
Respondent.

Sir,—Be pleased to take notice that application will be made to the Honourable the Supreme Court on .... the .... day of .... at 10 o'clock

in the forenoon, or so soon thereafter as counsel can be heard, on behalf of the above applicant, who is a creditor of, and interested in, the said insolvent estate, and at which time you will be required to shew cause, if any, why you shall not forthwith be ordered to have the liquidation and distribution account, framed by you of the said insolvent estate and filed in the office of the Master of the Supreme Court, examined, and confirmed, by this Honourable Court; and the dividends awarded, paid out to the respective creditors in conformity therewith. And further why you shall not be ordered to pay the costs of this application.

Dated at C. . . . . T . . . ., this . . . . day of . . . .

Yours, &c.

. . . . . .

Applicant's Attorneys.

To

C.D. . . . . of . . . .
in his capacity as sole trustee
of the insolvent estate of
E.F.
of . . . .
the above respondent.

Affidavit in support.

(Heading.)

I, A.B., of . . . ., make oath and say :—

1. That the respondent was, on the . . . . day of . . . ., confirmed by this Honourable Court in his election as trustee of the said insolvent estate.

2. That on the . . . . day of . . . . the said respondent filed with the Master of this Honourable Court his account of administration and distribution of said estate, and that no objection has been lodged thereto.

3. That, though the said respondent has been requested to get the said account confirmed by this Honourable Court, he has failed to do so.

Sworn at . . . .

Notice to a trustee to have his accounts and plan of distribution amended.

(Heading.)

A.B.
Applicant,
vs.
C.D. in his capacity as trustee of the insolvent estate of E.F. . . . . of . . . . and G.H. . . . . of . . . .
Respondents.

Sir,—Take notice that application will be made to this Honourable Court, on the . . . . day . . . . at 10 o'clock a.m., at which time you

will be required to shew cause why your account and plan of distribution of said estate shall not be amended, as to (*here state specifically in what respect the account is to be amended, or the grounds of objection to the account; you may give any one of the objections mentioned under the Chapter "Proofs of Debt"; or, as for instance*) the sum £...sterling, awarded to G.H. on his proof of debt for £.... for alleged maternal inheritance which is due to him out of the estate of his late mother, I.J., on the ground that the said proof was not a preferent claim as therein alleged, but was only a concurrent claim, by reason (*state why, for instance*) that he, after the death of his said mother, had entered into an agreement with his father, the said insolvent, to accept a promissory note for the amount of his said maternal inheritance and whereby his said claim has been novated and the preference which he otherwise had was thereby lost.

And why you shall not be ordered to pay the costs, &c.

(*Affidavit in support.*)

I, A.B., of ...., make oath and say :—

1. That Mrs. E.F., wife of the said insolvent, died on the .... day of ...., and the said E.F. was thereafter, viz., on the .... day of ...., appointed the executor testamentary of the said estate.

2. That at the date of her death her son, the said G.H., was 21 years old, and finding from the liquidation and distribution account, framed of her estate by the said E.F., the executor thereof, that the sum of £.... was then awarded to him, the said G.H., he, the said G.H., arranged with his father, the said executor, and now the said insolvent, that if the latter would give him a promissory note for the said amount payable four months thereafter, he would give him an acquittance of the said inheritance, which was duly accepted by the said insolvent, and his promissory note given to the said G.H.

3. That the said G.H. should therefore have proved on the estate of the said E.F. for the said promissory note, and not by virtue of the liquidation account of the estate of his said late mother, and that, by reason of this novation, the said G.H. is now debarred from proving on the said liquidation account, and he has thereby lost his preference on the estate of his said father, the insolvent, for his maternal inheritance.

A. B.

Sworn at ....
&c.

Notice by a trustee to an objecting creditor why his objection shall not be expunged.

(Heading.)

Between A.B., in his capacity as trustee of the insolvent estate of C.D. . . . . of . . . . applicant.

vs.

E.F., respondent.

Sir,—Take notice that the Honourable the Supreme Court will be moved on the . . . . day of . . . . at 10 o'clock in the forenoon, on behalf of the above applicant, at which time you will be required to shew cause why the objections, bearing date the . . . . day of . . . ., lodged by you against the confirmation of the liquidation and distribution account, framed by the said applicant, shall not be expunged;

And why you shall not be ordered to pay the costs of this application.

Dated at . . . . this . . . . day of . . . .

Yours, &c.

. . . . . .

Applicant's Attorneys.

To

E. F.

of . . . .

The above respondent.

(*Affidavit in support, to the effect that the account was lodged on the . . . . day of . . . . That on the . . . . the respondent lodged his objections, which he has neither prosecuted nor withdrawn.*)

Notice of motion to compel the trustee of an insolvent estate to pay out the dividends awarded to a creditor.

In the Supreme Court,

&c.

Between A.B., applicant,

and

C.D. in his capacity as trustee of the insolvent estate of E.F., respondent.

Sir,—Take notice that the Honourable the Supreme Court will be moved on the . . . . day of . . . . at ten o'clock in the forenoon, or so soon thereafter as counsel can be heard, on behalf of the above applicant, who is a creditor of, and interested in, the said insolvent estate, and at which time you will be required to shew cause, if any, why you shall not be ordered forthwith to pay to him the sum of £ . . . . sterling, being the amount of dividend on his claim proved in the said estate, awarded by

you to him, in the plan of distribution of the said estate framed by you, and confirmed by this Honourable Court on the . . . . day of . . . ., which sum, though duly demanded, you have failed to pay: And to shew cause also why you shall not be ordered to pay the costs of this application.

Dated at . . . . this . . . . day of . . . .

Yours, &c.,

. . . . . .

Applicant's Attorneys.

To C.D.

Trustee of the insolvent estate of E.F., the above respondent.

Cape Town.

Affidavit to accompany preceding notice.

In the Supreme Court,

&c.

Between A.B., applicant,

and

C.D. in his capacity as trustee of the insolvent estate of E.F., respondent.

I, A.B., of . . . ., the above applicant, make oath and say :—

1. That I am a creditor of the above insolvent estate and have duly proved my claim at the . . . . meeting of creditors of said estate, amounting to the sum of £ . . . ., due upon and by virtue of (*state here nature of debt, for instance*) a certain promissory note bearing date the . . . . day of . . . ., signed by the said insolvent in my favour.

2. That upon my said claim the said respondent has, in his plan of the distribution of the said estate, awarded me, as dividend, the sum of £ . . . .

3. That the account and plan of distribution of the said estate has been duly examined, and the confirmation thereof ordered by this Honourable Court on the . . . . day of . . . . last past.

Lastly: That I have duly demanded from the said respondent payment of the said dividend, awarded to me as aforesaid, but that the said respondent has failed to pay the same.

A.B.

Sworn at Cape Town this . . . . day of . . . .

Before me

. . . . . .

CHAPTER XL.

REHABILITATION, OR DISCHARGE: RELEASE FROM SEQUESTRATION.

I SHALL divide this Chapter into two parts.

A. Discharge or Rehabilitation
B. Release from Sequestration.

A. We are so used to the word "Rehabilitation" that it is difficult to believe it is to be found in the Insolvent Ordinance only once, and then not in direct reference to the subject of this Chapter. "Discharge" is the legal term for what we popularly call "rehabilitation."

There are two kinds of Discharge. The one upon an offer of composition by the insolvent;[1] the other without such offer.[2] In both cases, when granted by the Court, they have the same effect as to the release of the insolvent from all debts proved or provable, but under the former section the insolvent is liable for his offer of composition on the ground of novation. In both cases, also, if the insolvent applies to the Court *within four years* from the date of his insolvency for his discharge, he must produce a "*certificate*" that the majority of his creditors agree to the discharge; and so long as he has not this certificate of discharge he is frequently mentioned in the Ordinance as an "*uncertificated*" insolvent;[3] but after the lapse of four years he can apply to the Court for his discharge without any such certificate.[4]

To obtain a discharge by *virtue of a composition* the insolvent must make his offer not earlier than at the third meet-

[1] § 106.
[2] § 117.
[3] §§ 123 and 130–132.
[4] § 14, Act 38, 1884.

ing of his creditors. The offer has to be considered at a subsequent meeting of creditors, specially called for the purpose by the trustee upon 42 days' notice given in the *Gazette.* And if at such meeting the offer of composition shall be accepted by a four-fifths' majority (in respect both to their numbers and the value of claims represented) of the creditors who have proved debts against the estate, the Master "certifies" it to the Court. But the insolvent, before applying to the Court for his discharge by virtue of this certificate, must give 21 days' notice of his application in the *Gazette,* and must also make an affidavit to the effect that—

"he has made a full and fair surrender of his estate, and has not "granted or promised any preference or security, or made or promised any "payment, or entered into any secret or collusive agreement or transac-"tions, to obtain the concurrence of any creditor to the said offer of "composition."[1]

It is entirely in the discretion of the Court to grant or withhold the discharge by virtue of a composition (whether it be opposed or not); but, if granted, the sequestration is "at an end, and the insolvent re-invested with his estate."[2] There are other safeguards given in this section as to absent creditors. So also in terms of the reservation in this section the Court granted the rehabilitation, though the insolvent had entered into a composition to pay certain preferent debts in full.[3] The Supreme Court will not grant the rehabilitation of an insolvent whose estate has been sequestrated in another Court in this Colony unless the proceedings in the Insolvency, or certified copies thereof, are filed with the Registrar.[4]

To obtain a discharge without making an offer of composition (and this is popularly known by the term "rehabilitation") the third meeting of creditors must have been held. The insolvent then, either personally or by a friend, or by his solicitor, applies "to his creditors for a certificate testifying "their consent to his discharge being granted by the Court" (for which purpose he need not call a meeting). If the same four-fifths' majority (as mentioned above) of creditors agree

[1] See also *re Teich*, 13 S. C., 184.
[2] § 106, Insol. Ord.
[3] *Re Russouw and Kay*, 5 C. T., 210; 12 S. C., 172.
[4] *Re Isenberg*, 8 C. T., 126.

to this, he may give notice of his application forthwith; or if after six months from the confirmation of the plan of distribution of his estate, then the consent of a three-fifths' majority (as above) or a nine-tenths' majority in respect only of the value of claims represented shall be sufficient. *But in any case he must give six weeks' notice in the Gazette of his intention to apply to the Court for his discharge,* and he must also make an affidavit to the effect that—

"he has made a full and fair surrender of his estate, and has not "granted or promised any preference or security, or made or promised "any payment; or entered into any secret or collusive agreement or "transaction, in order to obtain the consent and certificate of his "creditors or of any of them."

If the assets of the estate are under £75 in value, the insolvent cannot apply to his creditors for his certificate until after the lapse of *three* months from the first meeting. So that in the case first above-mentioned, where four-fifths of the creditors of a large estate agree, the certificate may be granted after the third meeting, which may be within the three months, while in the case of the small estate three months after the first meeting must elapse. If the insolvent has obtained his certificate, and his application to the Court for a discharge is not opposed, the Court shall grant it; but if it be opposed the Court may make any order thereon "as the justice of the case shall require."[1]

But his own discharge from his own private estate shall be no discharge of his partnership debts; nor shall it discharge his partner, or any person who was jointly bound with him or was a surety for him.[2] Nor is his discharge as a member or as a partner of an insolvent firm a discharge also of the remaining partners of the firm. Nor does the discharge of the firm discharge the private estates of the several members of the firm. The application for the discharge of each estate must be made distinct and separate.[3] Usually the discharge of the firm is applied for by one or all of the members thereof; but one may apply for all or for himself

[1] § 117.
[2] § 120.
[3] *La Foret* vs. *Nourse*, 1 M., 485; and *Pocock, Matthews & Co.*, decided in 1870 and 1872, not reported.

alone; and the Court may grant the discharge of one member of a firm and refuse that of the other members. In the case here last quoted the Court granted the rehabilitation of Matthews and refused that of Pocock. And so also did they grant the rehabilitation of Vardy as a partner of the firm Patterson, Vardy and Co., and refused that of Patterson.[1] In the case of *McLeod* vs. *Biden and Co.*,[2] the Court said that "no partner can be rehabilitated as a partner only. There is "no provision in the Insolvent Ordinance for the rehabilita-"tion of a partner in an insolvent estate." But the attention of the Court had not been directed to the two previous cases here mentioned. In no case, however, will a person who has been convicted of fraudulent insolvency be entitled to his "certificate of allowance"; in other words, to his discharge or rehabilitation.[3]

If there should be a balance or residue, after the payment of all his creditors and also of administration expenses, it should be paid to the insolvent or to his legal representatives.[4] When once his "certificate (of discharge) has been allowed," in other words, when he has received his discharge, or obtained his rehabilitation (which latter word I shall, for convenience' sake, use hereafter), he can successfully plead his rehabilitation as a good defence to every action for any debt, claim, or demand, due or payable by him at the date of his sequestration. And if he should be in gaol for any claim proved against his estate he shall immediately be discharged, by order of a Judge, on producing the order of the Court granting his rehabilitation.[5] But if since the date of sequestration he had upon a new consideration undertaken to pay a debt due before that date, he cannot when sued plead his sequestration.[6] It is very rarely that an insolvent agrees to pay a debt for which he is no longer liable, but in the face of such an undertaking how can he conscientiously make the affidavit required by the 117th Section of the Insolvent Ordinance prior to his rehabilitation.

[1] Decided 1869, not reported.

[2] Decided November, 1882, not reported.

[3] § 118.

[4] § 121.

[5] § 123, and also *re Brunette*, decided 28th November, 1872, not reported.

[6] *Wicks* vs. *Pote*, 3 E.D.C., 74; *Quin Brothers* vs. *Van der Merwe*, 9 J., 217.

In the case of a husband, married in community of property, dying before he has received his rehabilitation, his widow may apply for it.[1] The widow's application is for the rehabilitation of the *joint estate* of herself and her deceased husband; but if the marriage was not in community there is no necessity for her to apply for the rehabilitation of her deceased husband's estate.

The question is frequently asked—Of what use is such an application by the widow, when the husband who had the marital power managed the estate and also surrendered it? The answer is, simply, *because of the wife's liability in case of a marriage in community for half of the husband's debts, when he died insolvent before obtaining a rehabilitation.* Of course this liability applies only to marriages *in* community of property. Hence, to be freed from such liability the widow applies for the rehabilitation of the joint estate in community.[2] The Court usually, as a matter of course, grants such rehabilitation; because, as the wife had not the marital power nor the management of the joint estate, she should not be blamed or punished for the acts of maladministration, if any, of her deceased husband.

In no instance, certainly not since 1859, has the Court ever refused the application of the widow for the rehabilitation of the joint estate. I cannot speak of what happened before 1859; certainly there is no case reported of the refusal of any such application. It seems absurd that the widow should apply for the rehabilitation of an estate of which she had not the administration, and of which perhaps she knew absolutely nothing; but the reason is, as stated, solely that *she may escape the liability of half her husband's debts, which the common law fixes her with in case she comes into property after his death.* But I can quite conceive that a case may arise to justify the Court in refusing the widow's application for the discharge of the joint estate where she has had the administration of the whole or part of the joint estate, as

[1] *Re Pratt*, 1872, not reported; *re Swart*, B. for 1873, p. 91; *re Cloete*, 4 J., 107; *re Glynn*, 3 C. T., 236; and a great number of similar cases since, not reported.

[2] See Chapter "*Marriage*" and *Faure* vs. *Divisional Council of Tulbagh*, 8 J., 72; *Brink* vs. *Louw*, 1 M., 210, and *Sichel* vs. *De Wet*, 5 E.D.C., 58.

sometimes happens; for instance, in case of the husband's absence, or when she carries on a public business, or actively manages her husband's affairs, and where, especially, the cause of the insolvency can be attributed either to her mismanagement alone or to hers equally with that of her husband, or in short for any act of commission or omission, contrary to the Insolvent law, for which the Court could refuse her own rehabilitation if she were married out of community of property.

When an insolvent has not received from his creditors his certificate of discharge, then, whether his application for rehabilitation is opposed or not, the granting or withholding of it is entirely in the discretion of the Court, according to the surrounding circumstances of each case, or as the 117th section says, "*as the justice of the case shall require.*"

It is, therefore, impossible to lay down a hard-and-fast rule. Each case must depend upon its own merits. But we may venture to say that, generally, in the exercise of its discretion, the Court has regard to the conformity of the insolvent's conduct to the Insolvent law, and to his conduct in the management of his affairs before, as well as after, his sequestration. Indifference to his business, carelessness, recklessness, over-speculation, or speculation in matters foreign to his usual business or calling; granting an undue preference to any creditor; not keeping proper books, or keeping no books, or insufficient books; not giving every information or reasonable assistance to his trustee; being in receipt of a good income, yet making no offer of compensation to his creditors; the estate paying little or no dividends to his creditors, or dividends partially or wholly only to preferent creditors and none to concurrent creditors; and, generally, any violation of, or non-compliance with, the terms of the Insolvent Ordinance;—are all good grounds for refusing the rehabilitation, either conditionally or unconditionally, totally or temporarily, for a fixed time, or *sine die.*

On the other hand, misfortune in business from unavoidable and unanticipated causes, and from no fault of the insolvent; no cause of complaint existing against him for contravening or evading in any way the Insolvent Ordinance;

no opposition being made to his rehabilitation; giving his trustee every information and assistance in his power in the realization and liquidation of the estate; the estate paying a reasonable dividend to creditors; the insolvent not being in a position to make his creditors any reparation for their loss; the estate having been surrendered long ago;—all these go to favour the insolvent's application for rehabilitation.

A few examples of refusal or suspension of application for rehabilitation will also illustrate the principles when they are granted or favourably considered, and must suffice here.

The Court totally refused to discharge an insolvent who was indicted for culpable insolvency under § 71, and convicted and sentenced to six months' imprisonment with hard labour;[1] while, on the other hand, another insolvent who had been indicted under the same section, and also convicted and sentenced to the same period, obtained his rehabilitation, the Court considering that his insolvency, though culpable, admitted (as the former case did not) of some extenuation.[2]

An insolvent against whom there was a charge of fraud, though he was not prosecuted for it, was totally denied his rehabilitation.[3]

An insolvent who has been guilty of undue preference is generally punished by a suspension of his discharge for a long time, or *sine die*, in proportion to the culpability of his act. So also those who have kept no books, or unsatisfactory books, or insufficient books, or who have been negligent, careless, or indifferent about their estates are, in like manner, punished by a refusal or a suspension of their application. Thus, where an insolvent had given an undue preference, his rehabilitation was suspended for six months.[4]

Another application was refused *sine die*, because the insolvent had kept no books;[5] while another insolvent's rehabilitation was suspended for two years for the same

[1] *Re Steensma*, decided May, 1868, not reported.

[2] *Re Enslin*, decided January, 1871, not reported.

[3] *Re Morkel*, decided in 1840, and again the same party in 1855, neither of which is reported.

[4] *Re Middleton*, decided February, 1855, not reported.

[5] *Re du Plessis*, decided July, 1889, not reported.

reason ;[1] and a third insolvent's rehabilitation was suspended for three months for the same reason.[2] Dozens of similar cases have since been refused or suspended for like terms on similar grounds. These refusals or suspensions may, in case of opposition, be with or without costs against the insolvent.[3]

Another insolvent was refused his rehabilitation for twelve months, because his trustee, who reported unfavourably against him, among other things said, "His affairs were conducted in "a 'happy-go-lucky' manner."[4]

An insolvent, whose insolvency was described as a "reckless one," had his rehabilitation suspended for twelve months ;[5] and another, for tearing out certain pages of his books, was refused his rehabilitation.[6]

One insolvent, who had been guilty of breach of trust by mixing moneys entrusted to him with his own and improperly dealing with them, had his rehabilitation suspended for twelve months with costs of opposition.[7] An insolvent, who was a shoemaker and had speculated very largely in brandy,[8] and another, who was also a shoemaker and had speculated largely in brick-making,[9] had their rehabilitations suspended *sine die*, with costs of opposition ; and on both occasions the Court remarked on the soundness of the ancient maxim "*Ne sutor ultra crepidam*" ("Shoemaker, stick to your last!"). Louw's rehabilitation (1884) was refused for two years for careless and over-speculation. None of the last three cases is reported. Another insolvent who had surrendered his estate seven years before the date of his application for rehabilitation was refused, and leave granted to him by the Court to apply again three years thereafter, because he had framed false schedules and also refused to render the trustee any assistance in looking after the estate.[10]

Under the Rehabilitation Act of 1859 the Court had

[1] *Re V. de Merwe*, decided November, 1890, not reported.

[2] *Re Bloom*, decided November, 1890, not reported.

[3] *Re Jones*, decided June, 1889 ; and *re Schlemmer*, decided September, 1889 ; *re Lambert*, decided March, 1890 ; none of which is reported.

[4] *Re Albertyn*, decided November, 1889, not reported.

[5] *Re Van Zyl*, decided May, 1884, not reported.

[6] *Re de Witt*, decided August, 1882, not reported.

[7] *Re Jackson*, decided September, 1886, not reported.

[8] Townsend, 1881.

[9] Caldecott, 1882.

[10] *Re Van Zyl*, 3 C. T., 112

absolute power in *all cases, without exception, whether all the creditors consented or not to the application*, to refuse a rehabilitation to an insolvent for any length of time, or altogether.

Certain rules and regulations were made by virtue of that Act, laying down certain points of practice to be observed. But with the repeal of that Act by Act 38 of 1884, § 117 of the Insolvent Ordinance No. 6 of 1843, was revived.[1] I have already stated that by the 117th section the creditors may grant the insolvent a certificate of discharge, but this discharge can be granted only within four years of the date of sequestration; *after that time the Court's discretion is unlimited.*[2]

By virtue of the latter section of the Act it was thought that after four years an insolvent either need not be rehabilitated, or that his rehabilitation must, as a matter of course, be granted. But in the first case which arose[3] the Chief Justice said—

"*It is within the discretion of the Court to grant an insolvent his "rehabilitation after four years: it is not imperative upon the Court to "do so.* We have more than once remarked that creditors should be "encouraged in bringing to the notice of the Court any facts which might "assist the Court in deciding whether to grant or refuse rehabilitation. "The application must *be refused with costs.*"

But when a creditor's opposition was vexatious or frivolous, the Court made him pay the costs incurred through his opposition.[4]

So also was an application for rehabilitation refused, after four years from the insolvency, though no creditors opposed, because the insolvent had kept no books,[5] and another application was refused because the four years had not expired, though there was no opposition.[6]

The 14th section of the Act of 1884, after saying that the Supreme Court "after the lapse of four years *may* discharge "non-fraudulent insolvents without certificate from creditors," adds, within a parenthesis, "*subject to such conditions as to "the giving of notice to creditors and otherwise, as the Court "may impose.*" By virtue of these latter words the Court

[1] § 14.
[2] § 14 of Act 34 of 1884.
[3] *Re ex parte Ras*, 7 J., 16.
[4] *Re Champion*, 1873; and *re Hill*, 1875, neither of which is reported.
[5] *Re Brand*, 1889, not reported.
[6] *Re Grant*, October, 1889, not reported.

has intimated that the previous practice under the Act of 1859, so far as not inconsistent with the Act of 1884, shall be observed. Thus six weeks' previous notice must still be given in the *Gazette*, and to the trustee, of the application for rehabilitation, and the insolvent must make oath of a full and fair surrender of his estate; security must be given to the satisfaction of the Master, to the extent of £25, towards the cost of any opposition to the rehabilitation;[1] and the balance-sheet formerly in use is also to be filed.[2] In this matter the Chief Justice said :—

"The rules in question (*i.e.*, the rules framed under Act 15 of 1859) were in force before Act 15 of 1867. That Act gave them statutory force, but the repeal of that Act does not repeal the rules. They have effect by reason of the Charter of Justice."

The attorney should place counsel in possession of all the material facts connected with the insolvency and the estate, so as to enable him to give information upon any point the Court may refer to arising out of the estate; such as the date of surrender; the assets and liabilities of the insolvent at the date of sequestration; amounts due to preferent and to concurrent creditors; what dividends have been awarded to them; the trustee's report; the examination of the insolvent, &c. And on the motion for rehabilitation counsel should state the whole case for the insolvent for, "if he has not been "able to obtain the consent of his creditors, the presumption "is that their opinion of him is not wholly favourable."[3]

Another practice under the Act of 1859 was, that no insolvent was, as a rule, to get his rehabilitation, *unless all the accounts of his estate had been confirmed and the dividend-receipts of creditors filed with the Master*, whose certificate to that effect was to be necessary and sufficient proof to the Court.

This practice the Court has intimated it would also continue under the Act of 1884.

In January, 1869, the Court refused the rehabilitation of Paterson, because his estate had not been finally liquidated

[1] See also *re Pretorius*, 9 J., 440, and *re Van Broemtsen*, 12 S. C., 239.

[2] *Re Helm*, decided June, 1898, 8 C. T., 213.

[3] *Re Tritsch*, 6 J., 245.

and all accounts confirmed: the same was done with the application of Pocock in December, 1869.[1]

To this rule the Court has ever since adhered, with the following exceptions, for the reasons given. On the same Pocock's renewing his application in September, 1872,[2] he satisfied the Court that certain landed property of little value in Namaqualand could not be sold for want of buyers, and the trustee, seeing no prospect of a sale in the near future, certified that the rest of the estate had been liquidated; whereupon the Court granted the rehabilitation under the circumstances. So also Wantenaar's rehabilitation was granted,[3] though final accounts had not been filed, because "creditors postponed the sale of some landed property in the hope that better prices might later on be obtained." In the matter of Nannucci's rehabilitation, where the trustees had resolved not to realise the principal asset—an hotel—the Chief Justice said[4]:—

"It has been the usual practice not to grant the rehabilitation of an "insolvent where the account and plan of distribution has not yet been "filed, *unless some satisfactory explanation is given why that has not been "done, and unless the insolvent shews that he has used every effort to "get the account filed.* In the present case I am satisfied that the "insolvent has done this. It is the wish of the creditors that the estate "should be kept open, and I do not think the insolvent should suffer for "that. The application is granted."

In the matter of Barry's rehabilitation,[5] the Court granted it, though all the accounts had not been filed, because "certain landed property which was leased under the direction of the mortgagees would be sacrificed if sold then." In the matter of Newlands[6] the Court granted his rehabilitation, though the account in his estate had not been confirmed owing to the negligence of the trustee to whom he had rendered all possible assistance and who was not to be found.

A person who wishes to oppose a rehabilitation should have a *locus standi*, as for instance, the trustee, or any of the

[1] Neither of which is reported.
[2] Not reported.
[3] August, 1884, not reported.
[4] 4 J., 171.
[5] 4 J., 399.
[6] 3 C. T., 297.

creditors who have proved a claim: therefore an unsatisfied creditor of an estate in which the insolvent was trustee, and which was mismanaged, but who was not a creditor of the insolvent also, had no *locus standi*, and could not oppose his rehabilitation.[1] The liquidators of a Bank placed under liquidation have a *locus standi* to oppose or to consent to a rehabilitation.[2] So also the Trustee of an insolvent is entitled in his representative capacity, though he is not a creditor, to appear and oppose the discharge of an insolvent though all the creditors had agreed thereto.[3]

B. *A Release from Sequestration* is when, by virtue of the 107th section of the Insolvent Ordinance, the Master has certified that *all* creditors who have proved on the estate either have consented in writing to such release, or have been paid their proofs in full. This release cannot be applied for until after the third meeting of creditors, and if granted it shall not discharge the insolvent from, or affect the rights of, any creditor who has not proved; and, though it is not anywhere mentioned in the Ordinance, the Court, by reason of its discretion, has decided that, as in the case of a discharge under the 106th section, so 21 days' notice in the *Gazette* of the application for release should be given to the creditors.[4] Thus the application for the release of Bradfield's estate was refused, because 21 days' notice had not been given.[5]

The granting of a release is in the discretion of the Court "if it should so think fit," but it has never yet been refused, except for an informality in the proceedings, or in case of a premature application. Thus it was refused in *Bradfield's* case, just mentioned, for the reason there given and because the third meeting of creditors had not been held. The application was, however, granted in *Kedgord's* case,[6] because, as his estate was under £75 in value, no third meeting of creditors was necessary.

[1] *Re Armitage*, B. for 1869, p. 11, and the same matter in June, 1869, when the rehabilitation was granted, not reported.

[2] *Re Pilgram*, 9 J., 441.

[3] *Re Steyn*, 13 S. C., 314.

[4] My pencil note of the name of the estate is obliterated, but this decision was on the 6th August, 1872.

[5] Decided December, 1875, not reported.

[6] January, 1873, not reported.

No provision is made in the Insolvent law as to estates not administered. In cases, therefore, where no accounts can be filed, either because no meetings of creditors were held, or no debts proved, or no trustee elected or appointed, the Court has supplied this *casus omissus* by directing that the insolvent's application should be, not for rehabilitation but, generally, for a release from, or a discharge of, the order of sequestration.[1] This is now the established practice in similar cases. But this cancellation of the order of sequestration does not relieve the insolvent of his debts. He is thereby simply reinvested with his estate, assets, and liabilities, as they were at the date of sequestration. Of course by the order of sequestration, being a judicial act, prescription of a debt is interrupted: but on the cancellation of the order all former rights and disabilities as they were at the moment of sequestration revive, and the prescription must be regarded as never interrupted. It is for these reasons that every effort is sometimes made by insolvents to get a trustee appointed, so as to make an administration of what there is of the estate, however little, in order to get a rehabilitation, in preference to a general release (*i.e.*, under no particular section of the Insolvent Ordinance) from sequestration.[2]

The question is sometimes asked, Of what use or benefit is a rehabilitation, when an insolvent can acquire property after the confirmation of the plan of distribution of his estate, and can no longer be imprisoned after the fourth year of his surrender? The answer is—

1st. That the natural conclusion is, where no rehabilitation is applied for, that the insolvency must be so bad that the creditors would not consent to the rehabilitation, or that the Court would be sure not to grant it.

2nd. That within the four years the insolvent may at any time be imprisoned for the deficiency of his estate: and that a rehabilitation releases him from such imprisonment.[3]

3rd. The general and natural reserve and hesitation in

[1] *Re Mostert*, in 1871; *re Brown*, in 1872; and *re de Lint*, in 1872, none of which is reported, and *re Bowern*, 1 J., 49.

[2] See also Chapter "*Compulsory Sequestration.*"

[3] See Chapter "*Civil Imprisonment.*"

business connections, owing to the fear of some unknown mine being sprung upon him.

4th. In case of a second surrender without a rehabilitation of the first surrender, the creditors of the first estate are entitled to prove on the second estate as well.

5th. There are several special disabilities attaching to an unrehabilitated or uncertificated insolvent, as for instance:—

(*a*) No fresh surrender can take place until after the confirmation of the accounts of his estate.[1]

(*b*) An unrehabilitated insolvent cannot acquire property against his trustee until the confirmation of the plan of distribution of his estate.[2]

(*c*) An unrehabilitated insolvent cannot be appointed a Justice of the Peace, and loses his commission by his insolvency;[3] nor can he be appointed Trustee to another insolvent estate;[4] nor a Tutor Dative; nor a Curator Bonis; nor an Executive Dative;[5] nor be elected a Member of Parliament;[6] nor a member of a Divisional Council,[7] nor of a Municipality;[8] nor of the Licensing Court; nor can he, according to the Trust Deeds of many Public Companies or Societies, be a Director of such companies or societies; nor become a member of the Civil Service; and he loses his situation in the Civil Service by insolvency.[9]

Before an application for rehabilitation is made to the Court it is necessary to observe the following requirements:—

a. The six weeks' notice in the *Gazette.*

b. Similar notice to the Trustee, with an affidavit of service.

c. The security of £25 to the Master, to meet the costs of opposition.

d. The oath of the insolvent of full and fair surrender.

e. The filing and confirming of accounts.

f. The filing of dividend receipts.

g. The particulars of the estate, mentioned hereinbefore, for the information of counsel.

[1] § 128, Insol. Ord.

[2] See Chapter "*Confirmation of Accounts.*"

[3] § 12 of Act 38 of 1884.

[4] § 41, Insol. Ord.

[5] § 17, Ord. 105.

[6] § 71, Constitution Ord. and § 8 of Act 78 of 1876.

[7] § 29, Act 40 of 1889.

[8] § 2 of Act 22 of 1893.

[9] § 18, Act 42 of 1885.

Here, in parallel columns, will be seen at first sight some of the differences between "Discharge" and "Release" mentioned in the Insolvent Ordinance—

Discharge under 106th Section.	*Discharge or Rehabilitation under 117th Section.*	*Release from Sequestration.*
a. The insolvent though freed from *all* debts proved remains liable for his offer of composition.	Freed from all debts due at the time of sequestration.	Not freed from any of his debts.
b. The insolvent is re-invested with his estate, and is liable only for debts to the extent of his offer of composition.	The insolvent is not re-invested with any part of his estate, nor is he liable for any debts existing at date of sequestration.	He is re-invested with the whole of his estate, assets and liabilities as they were at date of sequestration, as if there had been no surrender.
c. By complying with 106th section, and there being no opposition, insolvent, as a rule, gets his discharge.	Unless the certificate of the creditors to the discharge be obtained within four years from insolvency, the rehabilitation is entirely in the discretion of the Court.	By complying with the 107th Section the insolvent always gets his release.

Security towards costs of opposition.

I, A.B., of . . . ., do hereby interpose and bind myself as surety in the sum of £25 towards the payment of the costs of any person who may appear to oppose the discharge of C.D. of . . . ., an insolvent, and to whom the Supreme Court shall see fit to award his costs against the said insolvent.

Dated at . . . . this . . . . day of . . . .

A.B.

Certificate of the Master that the insolvent has given security.

I, A.B. of . . . ., the Master of the Supreme Court (*or Resident Magistrate, as the case may be*) do hereby certify that C.D. of . . . ., an insolvent debtor, has given sufficient security to my satisfaction in the sum of £25, for the payment of the costs of any person who may appear to oppose the discharge of the said insolvent, and to whom the Court shall see fit to award his costs against the said insolvent.

Given under my hand at . . . . this . . . . day of . . . .

Insolvent's oath of fair surrender, &c.

(Heading.)

I, A.B. of . . . ., an insolvent, make oath and say:—That I have made a full and fair surrender of my estate, and that I have not granted or promised any preference or security, or made or promised any payment, or entered into any secret or collusive agreement or transaction, in order to obtain the consent and certificate of my creditors (*If after the four years and no consent of creditors is obtained, then omit the words "in order to obtain the consent and certificate of my creditors," and substitute the words "with any intent to persuade my trustee or any creditor to forbear opposing my discharge by this Honourable Court"*).

A.B.

Sworn at . . . . this . . . . day of . . . . &c.

Notice of rehabilitation for the Gazette.

Notice to creditors.

In the Supreme Court of the Colony of the Cape of Good Hope.

In the Insolvent Estate of A.B. of . . . .

Notice is hereby given to the trustee and creditors in the above insolvent estate, that application will be made to the Supreme Court by motion, on the . . . . day of . . . . at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for the discharge of the above insolvent, at which time the trustee or any of the creditors may, upon due notice, appear to oppose the granting of the said discharge.

Dated at Cape Town, this . . . . day of . . . .

. . . . . .

Applicant's Attorneys.

NOTE.—*A copy of this notice is to be served on the trustee and an affidavit of service thereof made.*

CHAPTER XLI.

DISCOVERY ORDERS.

THE term "*discovery*" may be defined as the power which a Court has of compelling a litigant, in answer to his opponent, to reveal or disclose, on oath, any fact resting merely within his knowledge, or discover any document in his power or possession which would aid the Court in the enforcement of a right or in the redressing of a wrong.

It has its origin in the practice of the old Court of Chancery in England, and seems to date back as far as the time of Henry VI. It was confined to the Court of Chancery only, and was probably introduced on account of the very large equity jurisdiction which that Court exercised. No other Court in England exercised similar jurisdiction until the passing of the Judicature Acts of 1873 and 1875.

By the Common Law Procedure Act of 1854 certain powers were conferred on the Courts of Common Law which, though extensive, and though the procedure under that Act was itself derived from the practice in equity, yet differed widely from those exercised in Chancery; particularly in that they could only grant discovery on an affidavit by the applicant tracing some one document to the opponent. The result was that great difference prevailed between the practice of the Court of Chancery and that of the Common Law Courts as to discovery.

The object of the Judicature Acts was to assimilate the practice and to extend the doctrine of discovery, as it existed in the Court of Chancery, to all the high Courts in the Kingdom, and to give to those Courts in any cause or matter the same powers to order discovery, in aid of a claim

or defence, which could before those Acts have been obtained only by a Bill of Discovery in Chancery. Thus the right to Discovery under those Acts is not in *principle* more extensive than it formerly was in the Court of Chancery; and in a question of principle the Court has still to look to the decisions in Chancery, to ascertain the principle on which it shall act.

In framing the Rules under the Judicature Acts the principles of the Court of Chancery were followed rather than the more limited practice of the Courts of Common Law. The Acts have thus not enlarged the right of discovery and the right of disclosure of the practice of the Court of Chancery. It has been decided that these Acts make an alteration of procedure merely, not an alteration of law; consequently, that the practice and doctrine, except where altered by these Acts and Rules are still the same as they were formerly.

No doubt the Judicature Acts made a great improvement in reducing the practice to a uniform system; but yet a very large body of the practice was left unprovided for by the Rules under these Acts, and where no such provision was made by these Acts and Rules, the Chancery as well as the common law practice survives.

As we have still to look, principally, to the practice of the Court of Chancery as a guide where the Judicature Acts and Rules are silent, we must keep in view the practice of that Court, and the points in which it differed from that of the common law Courts previous to the passing of those Acts. Where the practices conflict, formerly the old procedure and practice of the Court of Chancery prevailed;[1] but now that practice prevails which is considered by the Court of Appeal to be the best or perhaps the most convenient.[2]

As to the origin of the practice of discovery, Lord Langdale, when Master of the Rolls, said[3]:—

"From the mode of proceeding at common law, a man with a full knowledge of facts which would shew the truth and justice of the case

[1] Bray on "Discovery," 1, 10; Peile's Law and Practice of Discovery, Addenda; Evans' Prac., S. Ct. Judicature, 273; and Wilson's Judicature Acts, 229, 231.

[2] *Smith* vs. *Day*, 44 L.T.R., 217.

[3] *Storey* vs. *Lennox*, 1 Keen, 341.

may, by concealing those facts within his own breast, and merely for want or disclosure or evidence, succeed in recovering a demand which he knows to be satisfied, or in resisting a demand which he knows to be just. This conduct is by the Courts of Equity considered to be against conscience; and they enable the party in danger of being oppressed by it to obtain from his adversary a discovery of the facts within his knowledge or belief, by filing a proper bill for the purpose; and by general rule a defendant to a proper bill of discovery is bound to make a complete disclosure of everything he knows or believes in relation to the matter in question. According to the general rule, he is not to withhold anything. Almost every bill of discovery contains a charge that the defendant has in his possession or power papers relating to the matter in question, and calls upon the defendant to set forth, as part of the discovery he is required to make, either the contents of the papers, or a list of the papers in order to their production. And by general rule the defendant is bound to produce (as part of the discovery he is required to make, and to complete his answer, which would otherwise be imperfect) all the papers which he admits to be in his possession, and which relate to the matters in question."

The doctrine of discovery, as now developed, being thus derived entirely from the law and practice in England, we must look to English decisions for guidance and precedents.

There was no such practice in force in Holland, nor, formerly, with us; but though there was no common law rule of discovery in that country, yet the Court possessed the power, upon special application on facts, to enforce an order for the production of documents. In the case of *Hart* vs. *Stone*[1] our Chief Justice said: "Under the Dutch laws the Judges had very large powers of ordering disclosures on facts, when justice can be defeated without such disclosure"; and in the case of *Biden* vs. *The French D'Esterre Diamond Mining Co.*[2] Sir Jacob Barry said that "the doctrine of discovery seems to be borrowed from the civil law in its *actio ad exhibendum.*"

By the law of Holland either party could summon or give notice to the other to produce at the trial certain documents which he specified, and which he knew to be in the possession of the other side, as material to his case. It was then in the discretion of the Court or Judge to grant such order for inspection and, if necessary, to take copies of such documents.[3] This practice is in force here also.

[1] 1 A., p. 309.
[2] 1 A., p. 95.
[3] Mer., 4, 38; and V. d. L. Jud. Prac., 3, 2, 7-9.

By our 132nd Rule of Court it is provided that

"in every case there shall be annexed to the pleading a schedule of all documents or papers which either party to the suit proposes to give in evidence at the trial; and inspection and copies of such documents and papers will be given, if in the possession or under the control of either party, to the opposite party or to his attorney. But it is in the discretion of the Court whether any document not in the schedule shall be admitted in evidence."

By our Rule 244

"either party may, however, at any time after the close of the pleadings, and at least two days before service by himself of notice of trial, or before or within two days after service of notice of trial by the opposite party, give notice to the latter of any document proposed by him to be made use of at the trial against the opposite party, and asking to have their execution admitted within a reasonable time specified in such notice, and offering inspection of such documents at a suitable place and time."

And also by our Rule 333*d* and *f*

"either party to a proceeding may give notice to the other party, in whose pleadings or affidavits reference is made to any documents, to produce such document for inspection within a reasonable time, on pain of not being entitled to use such document at the trial."

But it will be noticed that the practice derived from the law of Holland, and reaffirmed to some extent by our three Rules of Court just mentioned, applies only to such documents as either party knows to be in the possession of the other; whereas *the doctrine of discovery, as derived from the English practice, has the additional advantage that either party can make his opponent disclose the existence or contents of documents of which he himself may not be aware, or of which he may be in doubt.*

The rule of discovery in the Court of Chancery was said to have been introduced on the grounds of affording relief, and to assist in the administration of justice in some disputed questions. This relief was afforded originally by filing a bill in Chancery, which in reality amounted to a bill for discovery, and which also enabled either party to set to the other a series of interrogatories to be answered by him. The Court possessed very large discretionary powers in granting relief on equitable grounds where otherwise no justice could be obtained. It was, of course, easy to say "produce your

evidence, oral or written, and upon this the Court will decide." But it was just here that the difficulty came in, where you could get neither evidence nor documents to substantiate your case, and of which your opponent might be in possession and yet refuse information.

The benefits of discovery are that a party may see whether it be worth his while or not to go on with or to defend the action; also the saving of delay and expense by getting an admission from the other party of the case made against him, by exhibiting such documents as he has on the subject, and all with the view to assist the Court in arriving at a decision on some disputed question which cannot be obtained without it because the necessary materials are in the possession of other parties.

The policy of the Court is to give the most ample means to every person who is before it to obtain discovery on oath of every document or writing which may be evidence of title, or which may enable him to establish the claim which he prefers before the Court.[1] This practice is a very wholesome one, though at first sight it may seem to be harassing; for the orders to be granted by the Court or Judge are entirely in their discretion, according to the circumstances and the justice of each case. The Courts in England have frequently intimated, as did our Supreme Court here in the case of *Wiese* vs. *Mostert*,[2] "*that they would not allow this privilege to be abused.*"

Discovery is given to a party to assist him in proving a particular case, but not to assist him in a mere roving speculation to see if he can "fish out" a case or spy out flaws in his opponent's case.[3]

The right of a party to a suit to the benefit of the other's oath is limited to discovery of such material facts as relate to his case, and each party is to stand on the strength of his own case. The general principle is, that whatever a party or suitor knows respecting the matter in dispute, his adversary has the right to know.[4]

[1] *Bowen* vs. *Pearson*, 9 Jurist, N.S., 789.
[2] 10 J., 137.
[3] Peile, 41, and Bray, 16.
[4] *Owen* vs. *Wynn*, 9 Ch. D., 29.

As a general rule, the party applying for the order must have a sufficient *primâ facie* cause of his action and title to the discovery sought, and show that it is necessary for his own use, material to his case, and not merely for the satisfaction of prying into that of the adverse party; and he must also, if required, state his case, which will, if he be plaintiff, constitute a good ground of action, or, if he be defendant, a good ground of defence. The grounds for discovery may appear either from his summons or pleadings, or they may be supplied by means of a special affidavit of the cause of action.[1]

A party is not disabled from suing because he cannot get discovery from his opponent at all, or at any rate effectually;[2] and where an order for discovery cannot be enforced, the old common law right is still applicable, as, for instance, in proceedings in foreign Courts or tribunals which cannot of themselves enforce the discovery sought, as the case of arbitration. "The property being in India, the proper course is for the plaintiff to institute the suit in India, and he would have had the same right of discovery there as he would have here."[3]

Our rules of discovery are derived from the English Rules of 1873 and 1875, and can be found in our Rule 333, which was framed in 1880.

The English rules underwent a change in 1880 and in 1883, and again in November, 1893; the alterations on the two former occasions taking effect at the time, and those on the last occasion from the 1st of January, 1894. Therefore, in the interpretation of our local Rule, we must also bear in mind the changes and decisions made in England since 1880. But, as a matter of fact, if we examine into the gist of those changes, we shall find that they mainly reproduce and are based upon the decisions which some of the English Courts and Judges had previously given in the exercise of their discretion; and it was doubtless to place some of those discretionary orders beyond controversy that the amendments

[1] Evans, 273.

[2] *U.S. America* vs. *Wagner*, 2 Ch. App., 582.

[3] *Reiner* vs. *Salisbury*, L. R., 2 Ch. D., 378.

were made. It will be well, therefore, to give the local Rules of 1880 in a parallel column with the present English Rules of 1893, so as to show the mutual similarity or divergence:—

LOCAL RULE 333*a*.	ENGLISH RULE 11, ORD. 31.
It shall be lawful for the Court or a Judge at any time during the pendency of any action or proceedings to order the production by any party thereto, upon oath, of such documents in his possession or power relating to any matter in question in such action or proceeding as the Court or Judge shall think right, and the Court may deal with such documents, when produced, in such manner as shall appear just.	It shall be lawful for the Court or a Judge at any time during the pendency of any cause or matter to order the production by any party thereto, upon oath, of such documents in his possession or power relating to any matter in question in such cause or matter as the Court or Judge shall think right, and the Court may deal with such documents, when produced, in such manner as shall appear just.
LOCAL RULE 333*b*.	ENGLISH RULE 12, ORD. 31.
Any party may, without filing any affidavit, apply to a Judge for an order directing any other party to the action to make discovery, on oath, of the documents which are or have been in his possession or power relating to any matter in question in the action.	Any party may, without filing any affidavit, apply to the Court or a Judge for an order directing any other party to any cause or matter to make discovery, on oath, of the documents which are or have been in his possession or power relating to any matter in question therein. On the hearing of such application, the Court or Judge may either refuse and adjourn the same—if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter—or make such order for discovery, or relating to certain classes of documents, as may, in their or his discretion, be thought fit. Provided the discovery shall not be ordered when and so far as the Court shall be of opinion that it is unnecessary either for disposing fairly of the case or matter, or for saving costs.

It will be noticed that neither the English nor the Cape Rules above quoted are in their historical order, for in both

practices alike the order to produce is placed before the order to discover.

There is a branch of discovery in the English practice which has not been adopted by us, namely, "Discovery by Interrogatories."

The principles guiding the Courts of England in granting or refusing discovery by interrogatories were, for the most part, similar to, and indeed preceded, those governing the discovery of documents. The main object of discovery by interrogatories was to obtain admission from the other party, and so to relieve the suitor from the necessity of adducing evidence. But since the introduction of the rule for discovery, the rule for interrogatories is very rarely resorted to, owing to the facilities attaching to the former.

Our Rules as to the admission of certain evidence are numbered 132, 244, 333, and 335 respectively. *In this chapter I shall therefore confine myself simply to discovery as it affects documents.* The subject is a very wide and complicated one; and in this brief treatment of it I have endeavoured to piece together its chief leading principles, taken from the references given, which may conveniently be divided into two parts:—

(*a*) Discovery simple. For instance, the power of compelling your opponent to disclose what documents he has in his possession.

(*b*) The power of production or inspection of such documents.

The plaintiff is generally the first to apply for discovery; for, until he takes some legal steps, the defendant is not presumed to move in the matter. But as soon as the plaintiff has begun his action either party may apply for discovery. The cause or proceedings must actually be pending before an order for discovery can be applied for or granted, unless there are good grounds for an earlier application, such as to ascertain the names of the proper parties to sue, as will be mentioned further on.

Formerly, in the old Court of Chancery, the discovery of documents was considered a matter of strict right belonging

to the party applying for it. It is so no longer, but is entirely in the discretion of the Judge, who of course will not refuse it except for good reason;[1] and the Judge has also a discretionary power to demand, if necessary, an affidavit by the party applying.[2]

In a question of pure law no discovery can obviously be relevant; it is only, therefore, when there is some question of fact in dispute that discovery can presumably be required.[3]

In England, under the old practice, neither party was entitled to discovery until after the close of the pleadings; but this practice has, in recent years, been considerably modified, and the Courts have given discovery after the issue of summons, or in some cases even before, according to the special circumstances. Thus in England the Court would not grant the plaintiff discovery before he had filed his statement of claim.[4] In this Colony the Appeal Court has refused discovery where the application was regarded as premature, no action having then been instituted;[5] and in another case, where defendant applied for discovery before the plaintiff had filed his declaration or statement of claim, the Supreme Court granted an order, because the summons had already been issued by the plaintiff and the case was thus said to be pending. In the case of *Wiese* vs. *Mostert*,[6] the Chief Justice, in granting the order, added:—

"The rule appears to me to be wide enough to entitle the plaintiff after he has issued the summons, and the defendant after he has entered appearance, to apply to a Judge for an order; and it does not specify under what circumstances the order can be granted or refused. There may be cases where, upon the face of the summons, it may be inexpedient for a Judge to grant the order; and, as a general principle, the rule seems to require a Judge to make the order."

But on an application for discovery in another case[7] for an order similar to that in the case last mentioned, the Chief

[1] *Dickson* vs. *Harrison*, 47 L. J., Ch. D., 636.
[2] *Johnson* vs. *Smith*, 36 L. T., 741.
[3] Bray, 13.
[4] *Cashin* vs. *Craddock*, L. R., 2 Ch. D., 140.
[5] *Biden* vs. *French a'Esterre D. M. Co.*, 1 A., 95.
[6] 3 C. T., 133, and 10 J., 137.
[7] *Heydenrych* vs. *Farmer*, in June, 1893, not reported.

Justice, in granting it, postponed its execution, and made the following note on the application:—

"Grant the order, but not to be executed until after the declaration has been filed and served on the defendant. In *Wiese* vs. *Mostert* the Court ordered a discovery *before* the declaration; but that was at the instance of the defendant against the plaintiff, who would be presumed to know what the matters in question were. The defendant could not know from the summons what the matters in question are, and therefore the declaration should first be filed."[1]

Of course, though in England in the case of *Caskin* vs. *Craddock*,[2] the Court refused the plaintiff's application for discovery till he had pleaded, there is nothing to prevent the Court or a Judge, under special circumstances and if a strong case of urgent necessity be made out for such indulgence, from granting such application after the issue of the summons and before pleading (and in some cases even before the issue of a summons) on an affidavit disclosing a special case for discovery and production, or stating otherwise what the matters in question are.[3] As a general rule, however, even with us the Court or Judge will not grant to a plaintiff an order for discovery until he has filed his declaration, and to a defendant until the summons has been served on him. The exceptions will appear hereinafter. Thus, if a person intends *bonâ fide* to bring an action against a firm, and for this purpose wishes to know (as is necessary by the rules of our procedure) the names and addresses of the partners of the firm or of the persons forming the partnership; or wishes to sue a company or a corporation, and requires to know by what title they are to be sued; or to discover the names of assignees of an estate for the purpose of issuing a summons, or of a consignor from whom goods have been received; or the names of the printers or publishers of a newspaper, for the purpose of suing them;—in all such cases the Court, upon being satisfied that his action is *bonâ fide*, can grant the order to give the information required.[4]

[1] See also a subsequent case, *Van Noorden* vs. *Van Zyl*, 5 C. T., 100; Ibid, 12 S. C., 50.

[2] *Supra*.

[3] *Mercier* vs. *Cotton*, 1 Q. B. D., p. 442; *Martin* vs. *Hemming*, 19 Ex. D., 478.

[4] *Hart* vs. *Stone*, 1 A., 309; *Orr* vs. *Diaper*, 4 Ch. D., 92; and *Ramden* vs. *Beasley*, and *Lefroy* vs. *Burnside*, 4 L. R., 340.

A person cannot introduce into his pleadings a false allegation for the purpose of obtaining a *primâ facie* right to discovery.[1] Nor can a person be made a party to a suit merely for the purpose of discovery, unless it be in order to discover the names of other persons for the purpose of bringing actions against them under certain circumstances;[2] and however much a person may be interested in the success of an action, he cannot be made a party to it for the purpose of discovery.[3]

In actions by or against corporations or other public bodies, discovery must be given by the secretary, clerk, or other proper officer on behalf of such corporation, or by someone having personal knowledge of the documents in the possession of the corporate body; and in the case of minors and lunatics, their guardians and curators must give discovery in the best way they can.[4]

Discovery is not to be allowed in aid of a prosecution or of an indictment in criminal information, or in defence thereto. It is restricted to civil proceedings, whether by summons, petition, or motion.[5]

When the property claimed is in another country, no order for discovery can be granted to be enforced in that country;[6] nor will the Court entertain an application for discovery only in aid of proceedings in a foreign Court.[7]

In a petition of right, the suppliant cannot obtain an order for discovery of documents;[8] but the Crown can obtain discovery from him.[9]

A party is not entitled to the discovery of documents for the mere purpose of ascertaining whether they contain anything tending to disprove his opponent's case, or to shew some defect which may invalidate it.[10] Nor can discovery be allowed except for the *bonâ fide* purpose of assisting the party seeking it to prove the case at the trial of the action; as

[1] *G. W. Col. Co.* vs. *Tucker*, 9 L. R., Ch., 376.
[2] Bray, 20.
[3] Ibid, 40–57.
[4] Ibid, 62–67 and 84–87.
[5] Piele, 7.
[6] *Reiner* vs. *Salisbury*, 2 Ch. D., 378.
[7] *Dryfus* vs. *Peruvian Guano Co.*, 60 L. T., 216.
[8] *Thomas* vs. *Reg.*, 10 L. R., Q. B., 44.
[9] *Tomline* vs. *Reg.*, 48 L. J. Ex., 453.
[10] *Belton* vs. *Corporation of Liverpool*, 3 Simon Rep., 467, 15 L. T., Ch. D., 184.

otherwise it would constitute an abuse, or at least a misuse, of the process of the Court.[1]

The Court will take into consideration the special circumstances of each case; and, while it is careful that the party seeking to obtain the discovery which can be of use to him shall obtain it, it is bound also to protect the opposite party against undue inquisition into his affairs.[2]

The Court will furthermore in its discretion refuse the order, if it is vexatious or unreasonable; or if an attempt is made to press for any such minuteness of discovery as would be vexatious, unreasonable or oppressive; or again if it is too remote in its bearings upon the real facts at issue, and would amount to an oppressive inquisition.[3]

Nor will discovery be allowed if it is against public policy. For instance, in matters relating to affairs of State, or in the case of any official communication between public officers upon public affairs, or against the Sovereign, or against the Attorney-General as representing the Sovereign.[4] The refusal to allow discovery against the Sovereign arose from the dignity of the Crown, to which the Court was obliged to have regard, and accordingly officers of the Crown were not bound to make discovery. But the Crown's right to discovery against the subject is the same as that of any ordinary person.[5]

A plaintiff is not entitled to have an affidavit or documents from the defendant in an action for the penalties alone, on the ground that a Court of Equity would not have given discovery in a suit where the whole object was to convict the defendant in a penalty.[6] But when the time for enforcing a penalty or forfeiture had expired, he could not refuse discovery on the ground that it might tend to seriously reflect upon his character and conduct.[7]

The rights of the plaintiff and of the defendant to

[1] L. J., 3 Q. B. D., 664.

[2] *G. W. Col. Co.* vs. *Tucker*, 9 L. R., Ch. App., 376.

[3] *Kennedy* vs. *Lyall*, 48 L. T., 455; *Elmer* vs. *Creasy*, 9 L. R., Ch. App., 69; *Sheward* vs. *Lord Lonsdale*, 42 L. T., 172.

[4] *Wadeer* vs. *E. I. Co.*, B. de G. M. and G. R., 182; *U.S. of America* vs. *Wagner*, 2 Ch. App., 582.

[5] *A. G.* vs. *Corporation of London*, 2 M. & G., 247.

[6] *Chadwick vs. Chadwick*, 22 L. J., N. S., Eq., 329.

[7] *Parkhurst* vs. *Lowten*, 1 Mer., 400.

discovery are reciprocal, and the defendant is not in any case more entitled than the plaintiff to see the evidence of his opponent's case.[1] But though not so entitled, yet either party has the right to discovery not only in support of his original *primâ facie* case, but also of his answer to his opponent's case.[2] The plaintiff does not call upon the defendant to discover his own case or evidence. He makes a specific case of his own; and, in addition to discovery of matters which support his claim, he is entitled to discovery of matters which support his reply; and in like manner is the defendant entitled to discovery in support of his rejoinder. In short, each party is entitled, generally speaking, to discovery from the other as to matters wherein the burden of proof rests upon himself, but not as to matters in which the burden of proof rests upon his opponent.[3]

If an order for discovery should already have been granted when the party applying for it was not entitled thereto, the Judge may either cancel the order on these facts coming to his knowledge, or he may, on the opposite party refusing to discover, decide upon it. Points that can successfully be taken by the opposite party in refusing discovery, after the order for the same has been granted, will be considered by the Court; and a Judge can, upon an application for an order for discovery, refuse to grant it, if he is in possession of information justifying such refusal.

An order for discovery should be made only against a party on the record, and not against a solicitor or an agent, or anyone else.[4]

The party who has to make discovery is not excused by saying that he knows nothing about the matter, if his agents or servants acted for him in the ordinary course of business. He is bound to find out and to obtain the information from them; else he must show sufficient reasons, satisfactory to the Court, for not doing it.[5]

If the solicitor should make the affidavit instead of his

[1] *The Com. of Sewers, etc.* vs. *Glasse*, 42 L. J., Ch. 346.
[2] *A. G.* vs. *London Corporation*, 2 M. and G., 247.
[3] *Benbow* vs. *Low*, 16 Ch. D., 93.
[4] *Wilson* vs. *Raffalovich*, 7 Q. B. D., 553.
[5] *Bolckow* vs. *Fisher*, 10 Q. B. D., 161.

client, it is not in itself a sufficient compliance with the order; but it is in the discretion of the Judge to accept it or not, in lieu of the affidavit from the client, if he be satisfied that, under the circumstances, the solicitor was the best or the only person who could make the affidavit.

Upon a party wishing for discovery, and being in a position to apply for an order, he has simply to make a request to a Judge, who, without an affidavit from the applicant, will grant an order on the opposite party to discover;[1] though, as stated above, the Judge may demand a special affidavit if he thinks it necessary.

As a rule, the opposite party is bound to discover, except when the nature of the discovery sought is for the purpose of a criminal prosecution, or in cases where he is otherwise exempt, as will appear subsequently in this chapter. But although bound to discover on oath (with the exceptions named further on), he is not always bound to produce; and herein lies the whole problem of the doctrine of discovery, and for this reason there are so many decisions on the point in the English Courts.

It is no ground for refusing to discover if the discovery might expose a person's customers to a civil action;[2] or if it might expose other persons to criminal proceedings;[3] or if it might tend to affect a person's character.[4]

Discovery may be made not only pending any action or proceeding, but even after judgment, so long as the judgment remains unsatisfied or any proceeding can be taken upon it.[5]

The party applying for discovery makes no affidavit, but the party who is to make discovery must do so on oath. His affidavit must comply with the proper forms, otherwise it would be insufficient, and would also be regarded as suspicious, thus rendering him liable to make further discovery.[6] He must make an affidavit of all documents in his possession or power, or in the possession or power of someone else, which are material to the case of his opponent,

"however disagreeable it may be to have to make the disclosure, however

[1] Rule of Court 333b.
[2] *Tetley* vs. *Easton*, 18 C. B., 643.
[3] *King of Two Sicilies* vs. *Willcox*, 1 Sim. N. S., 301.
[4] *Chetwynd* vs. *Lindon*, 2 Ves. Sen., 450.
[5] *Salt* vs. *Cooper*, 16 L. R., Ch. D., 544.
[6] Peile, 115.

contrary to his personal interests, or however fatal to his own claim, ... he is compelled to set forth, on oath, all that he knows, believes or thinks in relation to the matters in question."[1]

He cannot refuse to do so merely because the action is against himself only, while the documents belong to his firm or are in the possession of other parties.[2] But whatever his objection, his affidavit should be full and state specifically the grounds for refusing discovery, and also such facts as shall satisfy the Court with regard to the privilege claimed, or that the documents are otherwise protected from production.[3]

In the case of *The Church* vs. *Financial Corporation*,[4] Vice-Chancellor Wood said :—

"The attempt has often been made, in one way or another, to escape the personal order for production, on the ground of the ownership of the documents being in a corporate or a partnership body. I myself recollect as a pleader having attempted it unsuccessfully in *Taylor* vs. *Rundell;* but it has always been decided that the parties must give all the information in their power, even if the documents be not in their possession in this sense, that they cannot be produced without an order for the purpose, because they are in the joint possession of others. The Court says that if you have any possession that is enough. There may be grounds for not producing, but even then you must give discovery."

If the party is not in a position to produce the documents required, his affidavit should clearly and fully shew this, leaving the Court to determine the sufficiency or otherwise of the affidavit and, if it be insufficient, to order further affidavits of discovery.[5]

Upon the questions of possession or non-possession, relevancy or irrelevancy, and the character and effect attributed to the documents, the deponent's oath is accepted as conclusive against the opposite party.[6] If he admit the relevancy of some of the documents but dispute that of others, he should clearly say so, and should mention in his affidavit those which he admits as being material to the case.[7]

[1] *Flight* vs. *Robins*, 8 Beav., 22.
[2] *Swanson* vs. *Lishman*, 45 L. T., 360.
[3] *Gardner* vs. *Irvin*, 4 Ex. D., 49; *Kain* vs. *Farrer*, 37 L. T. R., 470; *Webb* vs. *East*, 5 L. R., Ex. D., 108.
[4] L. R. 2 Eq. Cas., 271.
[5] *Bewicke* vs. *Graham*, 7 Q. B. D., 400.
[6] *Mylchreest* vs. *European D. M. Co.*, 2 A., 78.
[7] *Lamb* vs. *Orton*, 1 Drew, 414.

A discovery would be regarded as relevant if it affected the question of costs,[1] or for the purpose of reducing damages.[2] Nothing is regarded as irrelevant that may have an influence on the suit. If the matter in which discovery is sought be directly or indirectly material for arriving at a decision, the party must give discovery.[3] In the case of *Rowcliffe* vs. *Leigh*[4] Lord Justice James said: "No discovery is to be taken from a suitor, unless it is really relevant to the issue to be tried."

If the affidavit of discovery allege privilege, it is not sufficient to say that the documents are privileged as communications between attorney and client; it should allege the communications to be of a professional and of a confidential character.[5]

A party cannot of right be cross-examined on his affidavit of documents, nor can evidence be adduced to contradict it.[6]

A party cannot be called upon to make a further or better affidavit, unless the opposite party can shew that the first is insufficient, either in itself, or in the documents set out therein, or as regards the admissions in the pleadings of the party making it, or unless the Court be satisfied that the party making the affidavit has not in his possession or power other documents than those set forth, which may reasonably be supposed to contain the information required by the party seeking discovery; in which case a further affidavit will be required.[7]

It is not always necessary that the party should swear absolutely that the documents in question do not support, or tend to support, his opponent's case. A denial to the best of his knowledge, information or belief will be sufficient, unless there is something which qualifies the statement so as to shew substantial insufficiency on the face of the affidavit.[8]

When discovery of documents is made, it is not enough to tie them up in bundles, they must be described, and each

[1] Bray, 19.
[2] *Pope* vs. *Lister*, 20 W. R., 353.
[3] Bray, 17.
[4] 6 L. R., Ch. D., 256.
[5] *O'Shea* vs. *Wood*, 65 L. T., 30.
[6] *Lyell* vs. *Kennedy*, 27 L. R., Ch. D., 1.
[7] *Compagnie Financière* vs. *Peruvian Guano Co.*, 28 L. T., 22.
[8] *Minet* vs. *Morgan*, 8 Ch. App., 361.

document must be marked or numbered specially, so that any party requiring a particular document may call for it.[1]

As to the sufficiency or otherwise of the affidavit of discovery, it is for the Court to decide. In the case of *Bridley* vs. *Wilkinson*[2] Lord Justice Lindley said, in the Court of Appeal in England :—

"Now the real point in dispute will be whether these documents put into this bundle (referred to in the affidavit) are sufficiently protected from production; and the case has been argued before us as if that really was the substantial question in the case. But, in point of form, what we have to consider is the sufficiency of the affidavit in dealing with the question which arises as to what is necessary to set out in an affidavit, to make it sufficient upon that particular point of the case. *Taylor* vs. *Butler*, 39 L. T., 408, is conclusive. The principle of that case is enunciated in two or three lines which I will read : 'The principle of our decision is that the object of the affidavit is to enable the Court to make an order for the production of the documents mentioned in it, if the Court should think fit so to do, and that the description of the documents which enables production, if the order be enforced, is sufficient.'"

And Lord Justice Lopes, in the same case, said :—

"All that is required is, that the documents in question should be sufficiently identified to enable the Court to make the order for their production. The terms of this order are quite sufficient to enable the Court to make such an order. It is impossible to disguise from one's own mind that the real question which might be raised, and which ultimately must be raised, in this case is, Whether or not the documents in question are protected from production? It is not necessary for me to express any opinion on this subject, as it seems to me that the case of *Bewicke* vs. *Graham*[3] is directly in point, and is a case by which we are bound. I am unable to distinguish this case from that."

The rule that the plaintiff must recover on the strength of his title applies to all actions, at least to actions to recover property in the possession of the defendant, and implies that there is nothing in public policy to deprive plaintiff of his ordinary right of proving his own title by the lips of the defendant.[4] In other words, whatever a party is bound to prove at the hearing, he is at liberty to prove by the oath or admissions of his opponent.[5]

[1] *Cooke* vs. *Smith*, 64 L. T., 484.
[2] 69 L. T., 427.
[3] 45 L. T., 371.
[4] 52 L. J., Ch. D., 385.
[5] Bray, 21.

In the case of a libel action against a newspaper, if the defendant admits the publication of the words complained of, the plaintiff is not entitled to discover the name of the writer, unless the identity of such writer is a fact material to some issue raised in the case.[1] So also the Appeal Court in England has decided that an order for production and inspection of the manuscript ought not to be made, because the defendants ought not to be compelled to give information as to the writer of the libel.[2]

The order for discovery is obtainable only as between the parties between whom the issues or questions generally have to be litigated, or who at least have adverse interests, or seek in some form relief against each other. It is, therefore, as a rule, not obtainable as between a plaintiff and a co-plaintiff, a defendant and a co-defendant, unless there are cross claims admitted *inter se*, or issues are raised between them, relating to the questions in a suit, or where there may be rights to be adjusted between them respectively, with a view to shew who is ultimately really liable.[3]

In *Kennedy* vs. *Wakefield*,[4] Vice-Chancellor Stuart, quoting Lord Eldon, said :—

"There is no general rule, with respect to the practice of this Court, that will not yield to the demands of justice."

And again :—

"That case[5] shews that the Court will look to what the purposes of justice require, and will, without overstretching its authority, order such discovery to be made as may be necessary."

In the case of *Marner* vs. *Bright*,[6] Sir George Jessel, Master of the Rolls, said :—

"Such orders have been made several times in my Chambers. When there are several defendants to an action, who wish to try between

[1] *Gibson* vs. *Evans*, 61 L. T., 388.

[2] *Hope* vs. *Brass and another*, 76 L. T., 823.

[3] *Molloy* vs. *Kilby*, 15 Ch. D., 162; *Kennedy* vs. *Wakefield*, 39 L. J., Ch., 827; *Shaw* vs. *Smith*, 56 L. T., 40; *Brown* vs. *Walkins & Co.*, 16 Q. B. D., 125; *Bagot* vs. *Easton*, 11 Ch. D., 392; *Marner* vs. *Bright*, Ibid, 394; *Padwick* vs. *Scott*, 2 Ch. D., 736; *Hornby* vs. *Cardwell*, 45 L. T., 781, and 8 Q. B. D. (C. A.), 329.

[4] *Supra.*

[5] *The Princess of Wales* vs. *Lord Liverpool.*

[6] *Supra.*

themselves an issue with which the plaintiff has nothing to do, but which issue is germane to and connected with the matters in dispute, so as to be capable of being tried more cheaply, conveniently and expeditiously together with the other issues, and the plaintiff does not object . . . . . then . . . . . the order is made . . . . . so as to decide finally on all claims connected with the subject-matter of the action . . . . . When I am of opinion that the questions between the co-defendants can be more conveniently and cheaply tried in the action, then I usually make the order."

When an affidavit of discovery is sufficient, if the party making the application be refused inspection of the documents, he may apply to a Judge for an order for inspection. If the opposite party refuses to give discovery or complies only partially with the order for discovery, or for inspection, he is liable to attachment by an order of Court, or of a Judge. To make such person liable to attachment, it is not absolutely necessary that he should personally have been served with the order, though it is so in all other matters of contempt of Court. The order may be served on his solicitor, but if the party can satisfy the Court that he had no notice or knowledge of the order, and that his solicitor had neglected to inform him thereof, the Court will excuse him and make the solicitor liable to attachment.[1]

But, instead of making an order for, or additions to an order for, attachment against the party for not making discovery, or for not giving inspection, the Court or Judge may, in the case of a plaintiff, dismiss an action for want of prosecution; and, in the case of a defendant, may have his statement of defence struck out, or place him in the same position as if he had never pleaded.[2]

There is no *time* prescribed by the Rules of Court within which a party called upon to make an affidavit of discovery should do so. It is left in the discretion of the Court or Judge, who will fix a time according to the circumstances of each case and the locality of the person and of the alleged documents; and if the Judge should have fixed no time, then a reasonable time is meant, and if the party fails to comply

[1] *Browning* vs. *Sabin*, 5 Ch. D., 511. and *Von Hoff* vs. *Hoerster*, 27 L. J., Ex., 299; *Joy* vs. *Hadley*, 47 L. T., 615.

[2] Peile, 157, and *Liberia* vs. *Roye*, 1 App. Cas. 139.

with the order for discovery, or for inspection of the documents, he is liable to attachment.[1]

There is no rule at *what place* the document should be produced; but if the order to produce is silent upon that point, the usual practice is that the party who has to produce does so at his own solicitor's office, unless, as a matter of convenience, another place is agreed upon. But according to the distance, locality, bulk, or difficulty of removal, the Judge may fix what, under all the circumstances, seems the most reasonable place.[2]

The party who obtains the order has the right to make copies or extracts,[3] but he has no right, without the authority of a Court or of a Judge, to make use of their contents for the benefit of the public or for any other purpose than that of the suit, or to communicate them to others than parties to the suit;[4] and the right of inspection is confined to himself, or his solicitor or agent. If a special person has to inspect the documents, the leave of the Court or Judge must be asked for, upon an affidavit setting forth the grounds.[5]

In *Williams* vs. *The Prince of Wales L. In. Co.*,[6] the Master of the Rolls said:—

"It is the bounden duty of every plaintiff (or defendant) who inspects, to do it in a quiet, peaceable and decorous manner, in order that the business may be conducted in the only way in which it is possible for business to be transacted. If the contrary course was continued, I should hold the plaintiff justified in withholding the inspection until it was conducted in a peaceable, decorous and gentlemanly manner."

When the stage of the proceedings has advanced so far that the party has made discovery of all documents, the next point is to secure their production or inspection, which is really the fighting point in the doctrine of discovery. The late Judge Stephen, in his Digest of the Law of Evidence, Art. 1, defines a "document" as follows:—

"Any matter expressed or defined upon any substance by means of letters, figures, or marks, or by more than one of those means, intended

[1] See also Rule 333*h*, and since then, *Van Zyl* vs. *Van Noorden*, 12 S. C., 50.

[2] Bray, 165–173.

[3] *Wadeer* vs. *E. I. Co.*, 8 D. G. M. and G., 182; *Pratt* vs. *Pratt*, 47 L. T., 249.

[4] *Williams* vs. *The Prince of Wales L. In. Co.*, 23 Beav., 338; *Hopkinson* vs. *Burghley*, 2 Ch., 447.

[5] *Boyd* vs. *Petrie*, L. R., 3 Ch., 818; *Republic of Costa Rica* vs. *Erlanger*, 44 L. J., Ch. D., 402.

[6] *Supra*.

to be used, or which may be used, for the purpose of recording that matter."

And Lord Justice Brett defines the word "relating," mentioned in Rule 12 under the English Ord. 31 and our Rule 333*b*, as—

"Any document, not only which is evidence, but which you may not unreasonably suppose to contain information which *may*—not which *must*—directly or indirectly enable you to advance your own case or damage your adversary's case, must be set out. I say 'directly' or 'indirectly,' because it may be a document which could fairly lead to the train of enquiry which may have been one of those facts."[1]

For every reason for which a person might object to discovery he may also object to production and inspection; though, as a matter of practice, in almost every case in which a party objects to "discovery," he really means "production and inspection."

In the case of *Cruywagen* vs. *Gird*,[2] our Supreme Court decided that

"when reference is made by either party to any document which relates to matters in question in the action, the opposite party is entitled, under Rule 333, on due notice, to inspect the document and make a copy thereof. The party to whom notice has been given may object to the inspection, but he must state the grounds of his objection. One valid ground would be that he would be unjustly prejudiced by allowing the inspection . . . ."

Under the old practice in England the production of documents was a matter of right in the party claiming it, and not a matter in the discretion of the Court or Judge, unless the documents were privileged.[3] But the modern decisions, while following as far as possible the precedents of the old Courts, leave the matter of the production of the documents entirely in the discretion of the Court or Judge, who of course will grant or refuse the order upon such terms as will appear reasonable, and direct that such documents as may seem fit shall be produced; the intention being that whenever, during the progress of any proceedings, justice may be aided by the production of documents, the order should be made for their production.[4]

[1] *Compagnie Financière* vs. *Peruvian Guano Co.*, 48 L. T., 22.
[2] 7 C. T., 52.
[3] *Bustros* vs. *White*, 1 Q. B. D., 423.
[4] *Cashin* vs. *Craddock*, 2 Ch. D., 146; *Mellor* vs. *Thompson*, 49 L. T. R., 222.

Vice-Chancellor Bacon, in the first case quoted, says :—

"The Judge, therefore, when called upon to exercise the discretionary power which that 11th Rule vests in him, must have regard to every other rule of the order, and cannot exercise his discretion unless he takes a general view of the subject."

The possession necessary for the production of documents being *sole* possession, the party who objects to give production on the ground that he is not sole possessor is not bound to apply to his co-owners for liberty to produce, or to state in his affidavit that he has done so and was refused ; but he can nevertheless be made to set out the contents.[1]

Though the documents may be in another country, or in the solicitor's possession, or elsewhere, they are nevertheless said to be in the custody or power of the party who is called upon for discovery ; and unless he can shew good grounds for refusal, he must produce them, a reasonable time being allowed him for that purpose.[2]

A party is protected from producing a document if he can swear positively that it is not relevant, or that it does not relate to anything which has to be decided at the hearing.[3]

It is no excuse for a person to state that his solicitor, who claims a lien, withholds his papers ; for he can and must take proper means to acquire them ;[4] but the Court will not order a party to produce documents in which another person, not before the Court, has a property. In the case of *Kettlewell* vs. *Barstow*,[5] Lord Justice James said :—

"If documents are in the joint possession of the defendants and a person not before the Court, their production will not be ordered, because the Court will not order the defendants to do what they have no power to do ; but it is no ground for resisting production that a person not before the Court has an interest in the documents."

As to what documents are privileged, is a matter very much for the Court or Judge to decide, who must be satisfied that the documents come under the usual rule of privilege in legal

[1] *Hadley* vs. *McDougal*, 7 Ch. App., 312; and *Kearsley* vs. *Philips*, 10 Q. B. D., 465.

[2] *Farquharson* vs. *Balfour*, 1 T. and R., 184; *Wright* vs. *Mayer*, 6 Ves., 280.

[3] *Lyell* vs. *Kennedy*, 8 App. Cas., 229; *Kettlewell* vs. *Barstow*, L. R., 7 Ch. App., 686.

[4] *Rodick* vs. *Gandell*, 10 Beav., 270; *Wright* vs. *Mayer*, 6 Ves., 280.

[5] L. R. 7 Ch. App., 686.

matters. Thus, communications between a legal adviser and his client are privileged; so also are communications coming from any attorney, or agent or clerk employed by the attorney, or at his instance, or in any other way procured by the attorney; but this privilege does not extend to mere collateral facts which the legal adviser knows by other means than confidential communications from his client;[1] and when communications are claimed as privileged between attorney and client, the affidavit should state that they are of a professional and confidential character.[2] But when a solicitor is a party with his client to a fraud, no privilege attaches to the communications with him upon the subject, because the contriving of a fraud is no part of his duty as solicitor.[3] In the case of *Bullivant and others* vs. *The Attorney-General for Victoria*,[4] Lord Halsbury said:—

"It has been established as a principle of public policy that those con-
"fidential communications shall not be subject to production. But with
"of course this limitation has been put and justly put, that no Court can
"be called upon to protect communications which are in themselves part
"of a criminal or unlawful proceeding."

In the case of *Wheeler* vs. *le Marchant*.[5] Sir George Jessel, Master of the Rolls, said:—

"The cases protect documents communicated to the solicitors of the defendants by third parties whereby they have come into existence after litigation commenced or threatened, or in contemplation, and when they have been made with a view to such litigation, either for the purpose of eventually obtaining evidence to be used in such litigation, or of obtaining information which might lead to the discovery or obtaining of such evidence; but it has never hitherto been decided that the documents produced by a third party, as a surveyor or estate agent, merely in answer to an enquiry by the solicitor, are privileged from production. . . . . What is called the principle of privilege is of a very limited character. It does not protect all confidential communications which a man must necessarily make in order to obtain advice even for the protection of his life or of his honour, to say nothing of his fortune. There are many communications which are quite unprotected, but which must be made, because, without such communications being made, the ordinary business of life cannot be carried on.

[1] *Desborough* vs. *Rawlins*, 3 Myl. and Cra., 515; *Kennedy* vs. *Lyall*, 48 L. T. R., 455; *Perry* vs. *Smith*, 9 M. and W., 681.

[2] *O'Shea* vs. *Wood*, 65 L. T., 30.

[3] *Russel* vs. *Jackson*, 9 Ha., 392.

[4] 84 L. T., 737.

[5] 44 L. T., 632.

"The communication made to a medical man, whose advice is sought by a patient with respect to the probable origin of the disease as to which he is consulted, and which must necessarily be made in order to enable the medical man to advise or to prescribe for the patient, is not protected. All communications made to the priest in the confessional, on matters perhaps considered by the penitent to be more important even than the care of his life or his fortune, are not protected. Communications made to a friend with respect to matters of the most delicate nature on which advice is sought, with respect to a man's honour or reputation, are not protected. Therefore, it must not be supposed that there is any principle which says that every confidential communication which, in order to carry on the ordinary business of life, is necessary to be made, is protected. The protection is of a very limited character. It is a protection in this country restricted to the obtaining the assistance of lawyers as regards the conduct of litigation or the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery, in order that legal advice may be obtained safely and sufficiently.

"Keeping that in view, what has been done is, that the actual communication to the solicitor by the client is, of course, protected; and it is equally protected, whether that communication is made by the client in person to the solicitor in person, or is made by an agent on behalf of the client, who obtains the advice from the client for the solicitor. It would extend also to a clerk or a subordinate of the solicitor, who acted in his place and under his direction. Again, with the same view, the evidence obtained by the solicitor, or by his direction, or at his instance, even if obtained by the client, is protected after litigation has been commenced or threatened, or with a view to the defence or prosecution of such. So again, it does not matter whether the advice is obtained from the solicitor, as to a dealing which is not the subject of litigation. What is protected is, the communication necessary to obtain legal advice. It must be a communication made to the solicitor in that character, and for that purpose.

"But what we are asked here to protect is this: the solicitor, being consulted in a matter as to which no dispute has arisen, thinks he would like to know some further facts before giving his advice, and applies to a surveyor to tell him what the state of a given property is, or information of that character, and it is said that that ought to be protected, because the information is desired or required by the solicitor in order to enable him the better to give legal advice. It appears to me that is not only extending the rule beyond what has been previously laid down, but beyond what necessity warrants. It has never been found in practice (and the rule is now very old) that these documents required protection. It is an idea which has been started, if I may say so, for the first time to-day; and I think the best proof that the necessities of mankind have not been supposed to require this protection is, that it has never been asked.

"It seems to me we ought not to carry the rule any further than it has been carried. It is only a rule invented and maintained for the purpose of enabling a man to obtain legal advice with safety. That rule does not, as far as I am concerned, require to be carried further."

When a person's lien on documents might be prejudiced by their production, they are privileged.[1] A person is also exempt from the production of documents which tend to criminate himself,[2] or to criminate his wife. The affidavit should clearly state this, and the Court or Judge must be satisfied that the declining to answer is *bonâ fide* and with a view to avoid appreciable danger, and that the production might tend to criminate such party, or the husband or wife of such party.[3] But when a crime has been pardoned, discovery must be given.[4]

So again, a person is exempt from production, when the objection to produce is made on the ground of public policy; as in the case of communications between the Secretary of State and a Governor; or on the grounds of the public service of a country.[5] In such a case the head of the department or, in his absence, the deputed officer of the department, should make the affidavit claiming privilege.

Briefs are not privileged, but the observations, notes or remarks by counsel or the attorney are. A document is not privileged if it states only the opinion of an agent upon the case to his principal; nor is the report of an agent privileged with reference to matters in question before the commencement of the suit.[6]

The order for production should be made on the opposite suitor, not upon his attorney;[7] and where an application is made for third parties to produce documents, notice must be given to the opponents to the suit.[8]

If a party objects to discovery on the ground that it would be injurious, burdensome, or prejudicial to him to give it, it is

[1] *Newington Local Board* vs. *Eldridge*, 12 Ch. D., 349.

[2] *Roe* vs. *New York Associated Press and Decker*, 75 L. T., 31; *Hemming* vs. *Williamson*, 10 Q. B. D., 459.

[3] *Lamb* vs. *Munster*, 18 Q. B. D., 110; *re Reynolds*, 20 Ch. D., 294.

[4] *Reg.* vs. *Boyes*, 1 B. and S., 311.

[5] *Kain* vs. *Farrer*, 37 L. T., 469; *Hennessey* vs. *Wright*, 59 L. T., 323; *Wright* vs. *Mills*, 62 L. T., 558.

[6] *Bustros* vs. *White*, 1 Q. B. D., 423; *Anderson* vs. *Bank of British Columbia*, 2 Ch. D., 644; *Westinghouse* vs. *M. R. Co.*, 48 L. T., 98, 462.

[7] *Cashin* vs. *Craddock*, 2 Ch. D., 140.

[8] *Benyon* vs. *Godden*, quoted in Peile, pp. 8 and 177.

for the Court or Judge to consider whether, under the circumstances, production would be injurious to the party called upon without a corresponding benefit to the party asking for it; and if so, the Judge would refuse the order.[1]

The parties sometimes consent to submit the documents to a Judge for his decision as to whether they shall be produced or not. If this is agreed to, the Judge's decision cannot be questioned in a Court of Appeal.[2]

After the production of documents, bills alleged to be forged may be photographed by the other side, upon the order of a Judge; and in the granting of such an order, proper safeguards should be adopted, so as to secure the preservation of the bills.[3]

But, apart from the question of forgery, facsimile copies of documents may be photographed by order of a Judge. Thus, in a libel suit, on an application to inspect and take facsimile copies "by photograph or otherwise," Chief Justice Erle said:—

"It seems to me that by granting this application we shall be furthering the interests of truth and justice; and I cannot see any possible prejudice that can arise to the plaintiff."

The order itself was as follows:—

"That the defendant, his attorney, and witnesses respectively be at liberty to inspect and take facsimile copies by photograph or otherwise of the several letters and envelopes referred to in the declaration."[4]

[1] *Moore* vs. *Craven*, 7 Ch. App., 94; *Republic of Costa Rica* vs. *Erlanger*, 44 L. J., Ch., 305.

[2] *Bustros* vs. *White*, 45 L. J., Q. B. D., 642.

[3] *Lewis* vs. *Lord Londesborough*, 69 L. T., 353.

[4] *Davey* vs. *Remberton*, 11 C. B. (N.S.), 628.]

CHAPTER XLII.

ARTICLED CLERKS AND ADMISSION OF ATTORNEYS.

A.—ARTICLED CLERKS.

UP to the year 1806, the date to which we follow the law of Holland, there was no provision made in that country for articled clerks of the learned professions. Gentlemen there were admitted to their professions after examination without indentureship. It was the same here in this Colony till the year 1829. On this subject we are therefore entirely guided by the law of England, with such local additions or alterations as we have made. The first Charter of Justice of this Colony under British rule was published here in 1828. That Charter was superseded by another dated May, 1833. But by neither Charter was a provision made for indentureship. The Supreme Court, however, could frame rules, and by virtue of the first Charter the Court framed the 149th rule, which was promulgated on the 4th September, 1829, and is still in force.

This rule is the same as the one in force in England at that time. By the first Charter it was provided, as well as by the 46th Section of the second Charter, that

"so far as the circumstances of the Colony may permit, the rules shall be "framed with reference to corresponding rules and forms in use in the "Courts of Record at Westminster."

Several of the Rules of Court that are still in force refer to the 22nd Section of the Charter of Justice, *i.e.*, of the first Charter. The similar section in the second Charter is the

20th; both sections being alike. It is provided by this 20th Section that

"the Supreme Court can enrol any one who has been *instructed within* "*the Colony* in the knowledge and practice of the law by any Advocate "or Attorney of the Court, duly admitted to practise, and which person "shall be enrolled according to any Rule of Court to be made for that "purpose."

By the 149th Rule it is provided that—

"the service shall be by contract in writing *within this Colony* as clerk "to any Barrister, Attorney, Solicitor, or Proctor, duly admitted to "practise in the Supreme Court during a term of five years subsequent "to the date of such contract, and who shall during the *whole* of such "time of service *continue* to be actually employed *within this Colony* "as clerk in the proper business, practice, and employment of such "Barrister, etc., in the knowledge and practice of the law by such "Barrister, etc."

By virtue of this rule the Supreme Court has decided that the service of the articles must be *within this Colony,* and cannot be partly in and partly out of the Colony.[1]

Though provision is made by the Charter of Justice as well as by the Rule of Court for service of articles of clerkship for the whole period to an advocate, I know of no case where this has happened. In one instance there was a partial service of this nature, viz., of our old and respected friend Mr. Gysbert Reitz of Riversdale, who was articled for five years to the late Mr. Justice Watermeyer when still at the Bar, and that was very many years ago; but after serving three years his articles were transferred to an attorney for the remaining period.

Provision is made, not by the Charter but by a Rule of Court, for service of a portion of the articles to a Judge. By the 152nd Rule of Court it is provided that "service as clerk "to a Judge, or as Chief Clerk to the Attorney-General during "a period not exceeding four years shall be deemed . . . . "to be as effectual . . . . as if . . . . he had been *bound* to "serve and had served as clerk to a Barrister, etc." At the time this Rule was published Act 12 of 1858 was not in existence by which, on passing certain examinations, the

[1] *Re Hartzenberg*, B., 1873, p. 91.

period of service for admission as an attorney was restricted to three years. Since the promulgation of that Act the Court, adhering to the indentureship for one year to a barrister, or an attorney, etc., has admitted candidates on service as clerk to a Judge for two years, thus completing the total three years' service required by the Act. It will be noticed from the Rule in question that while the clerk must be *bound* by contract (*i.e.*, be indentured) to serve a barrister or attorney, etc., he need not be *bound* but only *serve* as clerk to a Judge. I know of no instance where the *Chief* Clerk of the Attorney-General has ever applied to the Supreme Court to have his service as clerk there counted in the same manner as that to a Judge. There are, however, many instances of service to a Judge, most of them not reported. The reported cases are—*re Kotze*,[1] and *re Hopley*.[2]

There is no doubt that much more professional knowledge can be gained in a barrister's than in a Judge's Chambers. The whole process of a case, the interviews and consultations with the attorney, the client, and the witnesses come before the barrister. The Judge gets only the dry bones, viz., the pleadings and counsel's argument. It is not likely, though there is no objection to it, that a Judge will give special instructions to his clerk in what the 149th Rule calls "proper business, practice, or employment of an attorney." But then it is to be observed that, while the barrister or attorney is bound by the 149th and 152nd Rules to give *instructions* to the clerk, the Judge is by the 152nd Rule under no such obligation. But the secret of the preference to serve a Judge rather than a barrister is that in the former case there is a reasonable emolument attached to the office, ranging from £200 and upwards per annum.

Though the Charter of Justice and the 149th Rule of Court speak of a service *within this Colony*, yet by another Rule, the 151st, if a person has been articled and duly served four years in England, Ireland, or Scotland, that service will count here if a further service of one year to a barrister or attorney, etc., *in this Colony* be duly entered into and completed. But since the passing of Act 12, of 1858, and

[1] 7 J., 66. [2] 5 C. T., 228.

Rule of Court 293; in 1877, the Supreme Court, taking the principle of three years' service mentioned in the Act, has allowed two years' service in the United Kingdom to count as part service here, on condition that an additional year shall be served to an attorney here, and that on passing the University Law Certificate examination and the Practical examination, to enrol such candidates as attorneys.[1]

Some of the candidates here mentioned had served five years in the United Kingdom, but as they had not passed the required examinations there for enrolment they were treated in the same way as those who had only served two years there, and had to serve a year here and also pass the Law Certificate and Practical examinations.

Though the period of five years required by the 149th Rule has not been repealed, there is a provision made by the 3rd Section of Act 12 of 1858 that those who pass the then second class law examination (now called the Law Certificate) may be admitted after three years' service. This is not a right which a clerk can demand, but an inducement to study and a privilege given to him if his principal is willing to forego the other two years. I know of only a few cases where the principal has insisted upon the serving of the full five years. It is for this reason, probably, that now almost all articles are framed for three years only. The exceptions are either in the case of youth, where the clerk will not be of the age of majority when his articles expire, or where there is some specific advantage or inducement to the clerk to be articled for five years instead of three. The examination under that Act was not compulsory, and at first few clerks availed themselves of it. Afterwards by Section 19 of the University Incorporation Act No. 16 of 1873 it was provided that, before a clerk could go up for his University Law examination (thenceforth called the Law Certificate examination), he must have passed the University Matriculation examination. Thereafter a further safeguard in the interest of the public was made by the Supreme Court, at the request of the Members

[1] *Re Lance*, B. for 1879, p. 78; *re Turnbull*, 3 J., 80; *re Lewis*, 3 J. 161; *re Craig*, 9 J., 295; *re Mulligan*, 4 C. T., 114 and 11 S. C., 111; *re Lee*, 11 S. C., 286 and 4 C. T., 295; and *re Davidson*, 11 C. T., 173.

of the Side-Bar in Cape Town, by the publication in 1877 of the 293rd Rule of Court, which provides for an examination as to a clerk's qualification in the *practical* branch of his profession. A practical examination for the admission of notaries had previously been provided for by Act 12 of 1858, and it was argued that those who intend to be attorneys shall also pass a practical examination as to their qualification. Hence the Rule in question. By the Incorporated Law Society's Act 27 of 1883, § 14, the University Law Certificate examination provided by the Acts of 1858 and 1873 was made compulsory. The Practical examinations apply also to the High Court in Griqualand West and the E. D. Courts (Rule 362). There are three examiners, one barrister and two attorneys, all of not less than seven years' standing, appointed by the Court for this purpose. They must *all* be present to examine the candidate, though the certificate of any two is sufficient.[1]

Articles of clerkship count from the date of their execution.[2] It is fraudulent to post-date or ante-date them: hence there must be an affidavit of attestation. This is generally done by one of the attesting witnesses, but it may be done by anyone else present. If the deed has been executed by the parties at different dates, the term of service begins only from the completion of its execution, that is, from the last date.[3] The affidavit may be sworn to at any time before filing the articles. By Rule of Court 213, as well as by Act 12 of 1858 and the Law Society's Act 27 of 1883, the articles of clerkship must be filed with the Registrar of the Supreme Court within three months from the date of execution, and by the last-named Act a copy must be filed also with the Secretary of the Law Society; failing this the period of service begins to count only from the deferred date of such filing. This requirement is imperative and no explanation or excuse will avail a candidate anything. It is as much therefore the duty of the principal as of the clerk to see that the articles are duly filed within the required time.[4]

[1] *Re Walker*, 4 J., 35.

[2] *Re Angel*, 4 J., 656; *re Ellis*, 5 L. T. (N.S.), 686.

[3] *Re Anon*, 27 L. J. Q. B., 184, quoted in Fisher's Digest, Vol. 6, p. 1791.

[4] *Re Brown*, B. for 1879, p. 73; *re Kyd*, 4 C. T., 153.

It is a mistake in articles of clerkship to serve as an attorney to insert, as so many attorneys do, that the articles include service as notary, and, as some even add, as conveyancer also. There is no service of any kind required to be a conveyancer. By Act 12 of 1858 a person may be articled as a notary alone, but the same Act also provides that every person who is an attorney can by virtue of it be admitted as a notary upon passing the practical examination for notaries. It is wrong and a mark of ignorance to insert in the articles for service as an attorney the service at the same time as a notary or conveyancer: such practice should therefore be discontinued.

No particular form of articles of clerkship is required in this Colony, though, since I joined the profession, I have adopted the form universally used in the United Kingdom as being under all circumstances the best, and most practitioners in this Colony have since done the same. At the foot hereof is the form with a few very slight alterations to suit local requirements. In the United Kingdom the period of time is five years, but on a comparison of the examination tests it will be seen that the Colony's requirements in that respect are better criteria of fitness and preparedness for the profession. We have to pass the Matriculation, the University Law, and the Practical examinations. All these are of a higher standard than the examinations required in the United Kingdom for the same purpose. This remark applies to the five year service in England. But there may be a three year service only in the United Kingdom in the case of those who have taken a University degree in Arts or Law; in which case, of course, the Arts degree examination is of a higher order than the Cape Matriculation, but not than the Law examination.

The 149th Rule of Court speaks of "*continuous*" service, and Act 12 of 1858, § 3, speaks of "*consecutive*" years for the periods therein named. Both expressions have the same meaning. This, if literally adhered to, would invalidate most articles of clerkship. Moreover, it would have been unfair to construe the 149th Rule literally, while the 151st Rule stands as to part service here and part in the United

Kingdom, especially as at the time when that Rule was framed (in 1829) communication between England and this Colony was at long intervals, by sailing vessels only, and very slow. However, in construing the expressions "*continuous service*" or "*consecutive years*" the Supreme Court has given a reasonable and liberal interpretation thereof, and thus by several years has anticipated a similar interpretation given in the Rolls Court in England, especially from the time when the late Sir George Jessel was Master of the Rolls. Without fixing a definite rule (which is next to impossible without doing an injustice) the Supreme Court has held that the *interruption must be for a reasonable time and for a just cause,* in order to entitle a clerk to count his period of service up to and inclusive of the interruption. In no case can the clerk demand this privilege. It is for the Court to be satisfied as to the justness of his claim, and the reasons for asking for relief must be fully set forth by the clerk in a petition, and be otherwise proved. Unavoidable absence from the Colony, illness, a reasonable period of studying for the necessary examinations (Matriculation and other) connected with the profession have been held to be just causes; and if the period of interruption is a very short one it may be counted as part of reasonable holidays.[1] In an English case,[2] Lord Justice Blackburn said :—

"I, of course, do not say that the service need be every day; a "reasonable amount of absence for holidays or short intervals of absence "owing to sickness would not prevent the service counting. But when, "as in the present case, the clerk is absent on a long sea voyage to the "Antipodes, he can have been acquiring no experience at all. Slight "interruptions would not prevent the clerk from having served, but with "so long a break-off as eleven months we cannot say that the clerk has "been actually employed during the whole term of five years in the proper "business of an attorney."[3]

Thus, whatever the cause of interruption may be, reasonable holidays excepted, the clerk must serve the period lost so as to make up the full three years. The affidavit by the

[1] *Re Johnson*, 1 J., 40; *re Will*, 7 J., 67; *re Van Zyl*, 6 J., 316; *re Gibbon*, 3 C. T., 311; *re Smith*, 4 J., 170; *re Katzenstein*, 7 J., 93; *re Hoyle*, Ibid, 97.

[2] *Ex parte Moses*, L. J., 9 Q. B., 1.

[3] See also *re Digby*, 45 L. J. Ch., 692; *re Vaughan*, W. W. & D., 46.

principal and the clerk must, *inter alia*, state that the latter has duly served for three years, and the interruption otherwise than for reasonable holidays should also be mentioned, with the causes thereof, and the dates. Thus, for instance, where a clerk left the office of his principal and took charge of a branch business of that principal for four months, the Supreme Court held that he had not served his principal during that time, because duly to serve means in the office where that principal is and not at another place; and so the clerk had to serve out the four months before he could be admitted.[1]

The absence of the principal from his office, if for a reasonable period, is not counted as an interruption; and where there is a partner of a firm left in the office, then no length of absence of the principal will affect the clerk's rights, as in that case the service is presumed to be to the firm.[2] But if the principal, whether he has a partner or not, is absent through imprisonment, or if he is suspended from practice, or is struck off the Rolls, or retires from practice, or becomes insane, the articles are in such cases interrupted, and fresh articles must be entered into for the remaining period.[3]

Service of articles cannot be entered into with an attorney who is himself a clerk to another attorney no matter what responsible position he may hold, and the service is *ab initio* void; and if a person should have been duly articled to an attorney, who afterwards becomes clerk to another attorney, the articles are interrupted, and further articles must be entered into for the remaining period with one who is not in the position of a clerk or managing clerk.[4]

In the case of the death of the principal the articles are thereby interrupted, though the principal may have a partner or partners surviving him, and fresh articles must be entered into for the remaining period, counting from the date of such

[1] *Re Scheepers*, 1 C. T., 63, and 8 J., 145; *re Gush*, 11 C. T., 160; see also *Badenhorst*, 8 J., 1.

[2] *Re Laws*, B. for 1873, p. 99. For English decisions see *re Fereday*, 46 L. J. Ch., 504, *re Duncan*, 10 L. J., 337.

[3] *Re Chantley*, 12 L. J. Q. B., 261; *re Anon*, 1 Chitty, 558; *re Darbell*, 6 Dowl. P. C., 505; *re Allen*, 8 Jur., 1169.

[4] Paley, Law of Solicitors, pp. 5 and 21; and *re Maasdorp* vs. *Cape Law Society*, decided in 1900, not reported.

fresh articles, as no articles or period of service can be ante-dated.

There are many Colonial instances of fresh articles, in case of death of the principal, having been entered into with another attorney. In the cases of *Payne and McCormack* vs. *The Law Society*,[1] the two clerks honestly believed that though their principal, Mr. Le Roux, had died during the currency of their articles, as there were managing clerks in the office who were attorneys continuing the business of the deceased, service to them would count. But the Supreme Court decided that the articles would count only up to the date of Mr. Le Roux's death, and that fresh articles must be entered into for the remaining period. This is just what the English Courts had previously decided—viz., that there can be no verbal service, and that service must be under *written* articles, else it would not count.[2] But, as pointed out above, the exception where no written articles are required in Cape Colony is when a clerk serves a Judge.

The stamps necessary on such renewed articles need not be paid again.[3]

Cession of the articles is also allowed and the service thereunder, as in the original or supplementary articles, must count from the date of the completion of the cession and cannot be ante-dated. The stamp required on the original articles is not necessary on a cession thereof. The attestation of supplementary articles as well as of a cession of articles must, like the original articles, be verified by affidavit. The supplementary articles and the cession of articles and the affidavits of verification must also be filed with the Registrar of the Supreme Court, and copies thereof with the Law Society.

No particular age is required before a person can be articled. The presumption, however, is that he must be of a reasonable and suitable age to begin to study for such a profession. In England the articles of a boy of nine years old were cancelled by the Court on the ground of his being

[1] Decided in 1901, not reported.

[2] *Re Austin*, 28 L. T., 121; *re Adams*, 35 L. T., 751; *re Lewis*, 13 L. J., 2 B., 261.

[3] *Re Van Os*, 4 J., 3, and several subsequent cases, not reported.

too young.[1] Eighteen is a suitable age to begin. In the office of my firm we do not article a clerk unless he has passed the University Matriculation examination, which is rarely done under eighteen; and it is as well that everyone should insist upon the Matriculation examination being first passed, so that the clerk can then devote his full three years to the study of law only.

During the term of service of articles the clerk must not hold any office or engage in any employment other than that for which he is articled. If he does so, he can either be refused his admission as an attorney if his time has already been served, or if it has not yet been fully served the Court can cancel his articles. In 1850 the Court refused the admission of Haw,[2] who, though he had been articled for five years, was proved during that period to have been in partnership with his brother in a general agency business. In 1857 the Court refused a similar application of Paterson[3] because it was proved that, though he had served five years, yet during the period of that service he had carried on or was engaged in private business before and after office hours. In 1868, after his serving four years and nine months, the Court cancelled the articles of Hofmeyr,[4] because it was proved that he had been privately carrying on a conveyancing business, though after office hours and with the knowledge of his principal.

But conducting cases in a Magistrate's Court, at the request of and for the benefit of the principal, will not vitiate the articles.[5]

At present the articled clerks in the United Kingdom are bound by 23 and 24 Vict. c. 127. By this Statute it is *inter alia* provided that clerks are expressly prohibited from engaging during the service in any other employment whatever. It is true the Statute, as such, is not in force in this Colony; but for the most part it is declaratory of what the common law of England was up to then, and what also the law was at the time our Charter of Justice was granted and Rules

[1] Corderoy, Law of Solicitors, p. 4.
[2] 1 S., 22.
[3] Not reported.
[4] Partly reported, R., 1, p. 332.
[5] *Re Brown* vs. *Hudson*, B. for 1869, p. 170.

of Court 149–153 were promulgated. The Rules of Court on the subject of articles of clerkship are copied from the practice then (1829) in force in England, and therefore the English decisions on the subject are applicable here. The most important of these are *re Greville*,[1] *re Duncan*,[2] *re Fereday*,[3] and *re Joyce*.[4] By the Solicitors Act of 1874, 37 and 38 Vict. c. 68, certain trivial exemptions from the stringency of the former Statute and the preceding decisions may now be obtained by the clerk in the United Kingdom on certain conditions. But these exemptions are not in force with us. It is for the Court here to be satisfied that the peculiar circumstances under which the clerk claims to be exempted from the stringency of the law, as laid down in the above decisions, are satisfactory and do not amount to an infringement of the law on the subject. We have no local cases on the subject, but the following English cases are instructive on the point—*re Peppercorn*,[5] *re Llewellyn*,[6] and *re Austin*.[7]

It is impossible to lay down a rule in such a matter which shall be applicable to every case; but it may be safely said generally, in addition to what the Supreme Court has decided in the cases of *Haw*, *Paterson*, and *Hofmeyr*, as mentioned above, that a clerk cannot be employed as secretary or treasurer or auditor to a public company, or to a Divisional Council, or to a Municipality, or act as trustee of an insolvent estate, or as an auctioneer, or as an insurance agent, etc., etc., even though to do these things would not interfere with his office hours and office work.

There is nothing to prevent a female being articled and from becoming an attorney. The Charter of Justice and the 149th, 150th, 151st, and 152nd Rules of Court speak of "persons"; so does Act 12 of 1858, and Act 27 of 1893. Similarly in the English law "person" is the word used; not male or gentleman. By the English Solicitors Act of 1843 the word "person" is also used, and by the 48th section of that Act it is provided "that every word

[1] 29 L. T., 542.
[2] 10 L. T., 337.
[3] 46 L. J. Ch., 504.
[4] 4 Ch. D., 598, and 46 L. J. Ch., 296.
[5] 36 L. J. C. P., 239.
[6] 12 L. J. Q. B., 138.
[7] 28 L. T., 121.

"imputing the masculine gender only shall extend and be "applied to a female as well as to a male, unless it be other-"wise specially provided or there be something in the subject "or context repugnant to such construction."

The Supreme Court has admitted females to be sworn translators and interpreters of that Court on the ground that such an office is neither a public nor a political one.[1] To be an attorney is certainly not a political profession, nor is it public in the sense meant by the Roman-Dutch law writers. By public office they meant in relation to the government of a people and its affairs.

The payment of a premium is no necessary part of the indentureship. But, if paid, it cannot be returned or any part of it, unless expressly agreed upon in the articles or where the principal fails, for whatever good cause, to carry out his part of the contract.[2] In the case of Thompson, 1 Ex. 864,[3] the Court refused to make an order on the attorney to refund a portion of the two hundred guineas paid by the articled clerk, who died within a month after he was articled: so also in the case of *Craven* vs. *Stubbins*,[4] the Court refused to order a return of any portion of the three hundred guineas premium paid by the guardian of the clerk, who after a few months wished to change his profession. But when the attorney dies before the articles have expired, the Court can in its discretion order a refund of part of the premium, unless the surviving partner is willing to take over the articles for the remaining period.[5] If the clerk throws up his articles, or is unable for whatever reason to continue his articles, or if his articles are cancelled for his misconduct, he cannot under any of these circumstances claim back any part of the premium paid. If a premium is to be paid, it must so appear in the articles. Indeed, whatever contract is made with an articled clerk should appear in the articles. If he is to get a salary, it should also be stipulated. In the case of Hofmeyr,[6] the Supreme Court held that the whole agreement

[1] *Re Flather and re Van Pelt*, 6 C. T., 695.

[2] *Craven* vs. *Stubbins*, 34 L. J. Ch., 126.

[3] Reported in Fischer's Digest, Vol. 6, p. 1793.

[4] 11 L. T., 602.

[5] *Hirst* vs. *Tolson*, 14 Jur., 559.

[6] Referred to in this Chapter.

with a person on entering into articles of clerkship should appear in the articles. Some articles of clerkship contain a clause that the clerk shall not practise in competition with the principal after his examination. Such a clause is not binding on a minor, unless he confirms it after coming of age. But if any one else who joins in signing the articles as guardian or surety personally takes upon himself the obligation, he is liable; and so also would be the clerk if of age when he entered into the articles, in which case the covenant can be enforced.[1]

It is better for a clerk to be articled to a member of the firm instead of to the firm itself. In this Colony articles are not with a firm though the service is. In England such articles are allowed, but the inconvenience has been felt when the partnership is dissolved, as both partners may claim the services of the clerk.[2]

The clerk is presumed to serve his articles at the place contemplated, and he cannot be compelled to follow his principal if the latter removes his business elsewhere.[3]

B.—ADMISSION OF ATTORNEYS.

Though no provision was made in Holland up to 1806 for articles of clerkship as an attorney, yet the educational qualification necessary before enrolment was important. We have no certain knowledge what general or preliminary education was required, but the Judges had to be satisfied as to the applicant's legal and practical knowledge of his profession. All the other obligations, duties, liabilities, and responsibilities of an attorney may be said to be the same in England to-day as they have been in Holland since the 13th century. Hence on this subject the law is much older in Holland than in England, though in the latter country there are many more precedents unfolding the principles of

[1] *Capes* vs. *Hutton*, 2 Ross., 357; *May* vs. *O'Neill*, 44 L. J. Ch., 660; *Baker* vs. *Hedgecock*, 39 Ch. D., 520; *Richards* vs. *Witham*, 66 L. T., 695; *Lornwall* vs. *Hawkins*, 41 L. J. Ch., 435.

[2] *Re Holland*, 26 L. T., 289.

[3] *Eaton* vs. *Weston and others*, 9 Q. B. D., 636, and 52 L. J. Q. B., 41.

the Dutch writers. The whole of those necessary for our purposes in this Colony will be treated of in the next chapter.

Under the old law of England the term "attorney" applied to those who practised in the Courts of Common law: the term "solicitor" to those who conducted suits in Chancery. Originally the latter term was inferior to the former. Afterwards the terms were on a level, and by the English Judicature Act of 1873[1] all alike were called "solicitors," the term "attorney" having since then ceased to be used. There was no reason for dropping it except that long before the change the general English public took a fancy to the term "solicitor" and used it in preference to the other. By our Charter of Justice and by Rules of Court 149–153, we may use any of the terms attorney, solicitor, or proctor. "Attorney" is still the more general term used here, although "solicitor" is gradually coming into fashion.

The only foreign attorneys or solicitors who can be admitted to practise as such in the Cape Colony are those who have been admitted and enrolled in England, Ireland, or Scotland. From no other part of the world, not even from any of the British Colonies, can they be admitted to practise here, unless they are also solicitors of the United Kingdom.

By the Charter of Justice[2] the Supreme Court can enrol

"persons being attorneys or solicitors of any of our Courts of Record at "Westminster or Dublin, or being proctors admitted to practise in any "Ecclesiastical Court in England or Ireland, or being writers to the "Signet in Scotland."

And by the 293rd Rule of Court "Solicitors of England, "Ireland, or the Supreme Court of Scotland" shall be admitted to practise in the Supreme Court. In Scotland a provision is in force which is not so elsewhere, that if a solicitor (now also called in Scotland "law agent") wishes to practise only in the Sheriffs' Courts or County Courts of Scotland, he shall pay a very much smaller stamp duty on his admission than if he wishes to practise in the Supreme Court of that country. The period of service and the

[1] 36 & 37 Vict. c. 66, 87.

[2] § 19.

examinations are the same. The stamp duty alone makes the difference. The seventeenth section of 36 and 37 Vict. c. 63 of 1873 says:—

"An enrolled agent who has paid the stamp duty exigible by law on "admission to practise as an agent in a Sheriff's Court shall be qualified "to sign the roll of agents practising in the Court of Session on paying "the difference between such duty and the duty chargeable on admission "to practise in the Court of Session."

Thus, if a solicitor of Scotland has permission to practise only in the Sheriff's Court there, he can only be admitted here to practise in our Circuit Courts; and unless, therefore, he is also enrolled in the Supreme Court of Scotland, he cannot be admitted to the Supreme Court here.[1]

The foreign attorneys or solicitors who are entitled to be admitted here whether to the Supreme Court or Circuit Courts only pay the fees for admission, about £20, but pass no examinations and serve no further time.[2] They must, however, before enrolment get themselves identified with their certificate by affidavit from some trustworthy and responsible person, and must themselves make an affidavit that they are the persons referred to in the certificate of enrolment; that they have not been suspended from practice; that no proceedings for suspension were pending against them, nor are any anticipated; and that their names are still on the Roll at the place where they were admitted. This affidavit should be supported by an affidavit or certificate from the Secretary of the Incorporated Law Society in England, Scotland, or Ireland, that the applicant had not been struck off the Roll of Solicitors nor suspended from practice, and that no complaint of misconduct had been made against him.[3]

From what has been said above under the heading of "Articled Clerks" it will be seen who among them who have served their articles in this Colony are entitled to be admitted and enrolled as attorneys. There must be proof filed with the Registrar of the Supreme Court and with the

[1] Rules 198, 199, and 293; *re Milligan*, 11 S. C., 111, and 4 C. T., 114; *re Kemlo*, 9 J., 305.

[2] § 18 of Act 27 of 1885.

[3] *Re Milner*, 9 C. T., 75, and *re Greening*, decided 1902, not reported.

Law Society that the candidate has passed the requisite examinations of the University and the Practical examination, and that he has duly served his three years' articles. The proof of the two former is given by exhibiting the certificates, that of the latter by filing the necessary affidavits made by the principal and the clerk. By some unaccountable oversight, for which probably I am more to be blamed than anyone else, Section 17 of Act 27 of 1883 was passed in its present form. It says :—

"A Certificate of having passed the Examination prescribed by "section 14 of this Act (*i.e.*, as to the Law Certificate examination) shall "not be required from any person exempted by the 10th section of the "Solicitors Act 1877 of the Imperial Parliament, 40 & 41 Vic., chap. 25."

Now this tenth section of the Imperial Act refers to general exemptions from certain preliminary examinations, and among those who are exempted are those "who have passed the first public examination before the Moderators at Oxford, or the previous examination at Cambridge." The result is that any one who has passed the said examinations of these two universities escapes the Law Certificate examination here, and can be admitted as an attorney after a service of three years to an attorney here and on passing the practical examination. One such incident has actually occurred, and it was only when S——, in 1897, applied for his admission as an attorney that this anomaly was discovered. He served his three years to an attorney and passed the Practical examination only. Of course he was admitted.

The application for enrolment can be refused, not only on the ground that the papers are not all in order, but for any other reasonable cause, and although not necessarily for professional misconduct yet for such conduct as would warrant the Court in holding him to be an undesirable person to be a member of the profession either for a time or permanently.[1]

Before Act 27 of 1883 six weeks' notice was required in the Government *Gazette* before an application for admission

[1] See *re Four Solicitors*, cited by Poley, pp. 122 and 124; also *re Wear*: 69 L. T., 522; *re Hill*, 18 L. T., 564.

could be made. It was so by the law of Holland and is so still in England, though notice is not given in the *Gazette*, but to the Incorporated Law Society there. By the Act just mentioned no advertisement is necessary, but the notice should be given to the Law Society here a reasonable time before the application is made.

Although formerly the Court admitted a person under the age of majority [1] they have since declined to do so, and insisted that the applicant must be of the age of twenty-one years before he can be admitted as an attorney.[2] There is no provision on this subject in any of our local laws; but inasmuch as a notary public had to be twenty-one years old before he could be admitted by Act 12 of 1858, the Court held in the case here mentioned that, as the office of an attorney was a more important one, he also should be of the same age before being admitted.

By a Statute passed 10th July, 1900, in the Imperial Parliament, 63 & 64 Vict., chap. 14, Colonial attorneys of all British Colonies can now practise in the United Kingdom on producing proof of identification and of being still on the Roll. Probably very few indeed will take advantage of this privilege, but it is one that has been long fought for, and if it has no other than a sentimental effect, it is nevertheless a concession in return for compelling us to admit and enrol solicitors from the United Kingdom.

By Act 30 of 1892, §§ 2 and 3, the Cape Parliament made provision to admit and enrol in the Supreme Court here on certain terms attorneys of the Supreme Court of Natal and of the High Courts of the South African Republic and Orange Free State. But those countries have hitherto failed to pass Reciprocity Acts, and the Cape Act is consequently still inoperative.

The law relating to the admission of attorneys to the Supreme Court applies equally to those who wish to be admitted in the E. D. Court or the High Court of Griqualand West, and so also the notices therefor to the Law Society.[3]

[1] *Re Powrie and De Villiers*, 4 S., 7.
[2] *Re Hull*, B. for 1869, p. 288.
[3] §§ 15, 18, and 19 of Act 27 of 1883.

All attorneys of the Supreme Court are by virtue thereof attorneys also of all the Courts in the Colony.[1]

Attorneys are officers of the Court, and the Court can exercise summary jurisdiction over them as such in all matters of professional misconduct.[2]

While there is nothing to prevent an attorney from carrying on a partnership business with a non-attorney, it can only be on matters unconnected with his professional calling. He can in no wise and under no pretence whatever advertise, write, send out circulars, or intimate, whether verbally or in writing, or by signature of the firm's name, that such a person is an attorney, or acts as attorney, singly or jointly with him. If he does so offend he is liable to be struck off the Rolls, or to be otherwise subject to a discretionary punishment by the Court. In the following cases the Court ordered the parties to pay the costs of the application, as the Law Society did not press the matter, but only wished for an expression of the Court's opinion,[3] but the Court intimated that in future the application to strike the offender's name off the Rolls would be enforced. By statutory enactment in England a person who advertises or allows himself to be advertised as a solicitor is severely punished. We have no local rule on the subject, but there is no doubt that a person who is not an attorney, giving himself out as such, is liable for contempt of Court, as he is assuming a professional status which the Court alone can give him.

By the 21st section of the Charter of Justice the Supreme Court can strike an attorney's name off the Roll *upon reasonable cause.* By the 22nd section of Act 27 of 1883 the Law Society may enquire into the *professional conduct* of an attorney, and it shall be incumbent on the President thereof to bring such conduct to the notice of the Supreme Court by motion for striking off the Rolls or for other punishment of the accused party. If any one else should move to have the attorney's name struck off the Roll, notice thereof must be given to the Society.[4] Of course if the

[1] Rule of Court, 195; Act 21 of 1864, § 13; Act 39 of 1877, § 21; Act 27 of 1883, and the Magistrate's Court Act.

[2] See next Chapter.

[3] *Law Society* vs. *Syme*, and *Ibid.* vs. *Morkel*, both decided in 1884, not reported.

[4] § 20, Ibid.

Court or a Judge calls upon an attorney to show cause why he should not be struck off the Rolls, no notice thereof need be given to the Society. As a rule, however, the Court refers the matter to the Society.

The grounds for moving to strike an attorney's name off the Roll must be set forth in the notice of motion, or in the affidavit in support thereof, and he must have reasonable notice thereof. Any *fact* which can be proved to amount to what the Charter of Justice calls *reasonable cause*, or what the Law Society's Act calls *professional misconduct*, is a sufficient ground for striking the accused party's name off the Rolls. For examples thereof see next Chapter.

But apart from any enquiry which the Law Society may make in terms of § 22 of their Act, that enquiry is dispensed with where an attorney has been convicted of any criminal act. In such a case the Law Society, following the practice in England, moves the Court to have the attorney's name struck off the Rolls on an affidavit identifying the attorney and on producing a certified copy of the conviction.

Even after a person has been admitted as an attorney he may be struck off the Rolls if it is found that he has not duly served his articles.[1]

The Court can, in its discretion, strike an attorney off, or suspend him, or award any lesser punishment according to the nature of the offence.[2]

Articles of Clerkship.

THIS INDENTURE made the day of 19 , between
of Cape Town one of the Attorneys of the Supreme Court of the Colony of the Cape of Good Hope (hereinafter called the Principal) and
(hereinafter called the Student) a minor, duly assisted by his father and natural Guardian,
(hereinafter called the Guardian) of

WITNESSETH,—That the said Student of his own free will, and by and with the consent and approbation of his said Guardian, doth by these presents put, place and bind himself clerk to the said Principal, to serve

[1] *Re Taylor*, 6 D. & R., 428.
[2] *Re a Solicitor*, 61 L. T., 842; *re Weare*, 69 L. T., 522; see also next Chapter.

him from the day of the date hereof for and during and until the full end and term of three years from hence next ensuing, and fully to be complete and ended. And the said Guardian doth hereby for himself, his executors and administrators, covenant and agree with the said Principal, his executors, administrators and assigns, in manner following, that is to say, that he, the said Student, will well and faithfully and diligently serve the said Principal as his Clerk in the profession of an Attorney-at-Law from the day of the date hereof for and during the said term of three years, and that he the said Student shall not at any time during the said term of three years cancel, obliterate, spoil, destroy, waste or embezzle any of the books, papers, writings, moneys, stamps, or other property of the said Principal, his executors, administrators or assigns, or any of his clients or employers, which shall be deposited in his hands or entrusted to his custody or possession, or to the care, custody or possession of the said Student, and that in case the said Student shall act contrary to the last-mentioned covenant, or if he, the said Principal, his executors, administrators or assigns shall sustain or suffer any loss, damage or prejudice by the misbehaviour, neglect or improper conduct of the said Student, he, the said Guardian, his executors or administrators, shall make good and reimburse him, the said Principal, the amount and value thereof. And further, that he, the said Student, shall and will from time to time, and at all times during the said term of three years, keep the secrets of the said Principal, and readily obey and execute his lawful and reasonable commands, and shall not depart or absent himself from the service or employ of the said Principal during the said term without his consent first obtained, but shall from time to time, and at all times during the said term, conduct himself with all due diligence, honesty, sobriety and temperance. And that he, the said Guardian, his executors and administrators, shall and will at all times during the said term, at his and their proper costs and charges, find and provide the said Student with all and all manner of necessary and becoming apparel and washing, and also medicine, surgery and medical advice and nursing in case of sickness. And the said Student doth hereby for himself and on his part consent and agree to, and with the said Principal, his executors, administrators and assigns, that he, the said Student, shall and will truly and honestly and diligently serve the said Principal at all times for and during the said term as a faithful clerk ought to do in all things whatsoever, in the manner above specified. And this Indenture further witnesseth that in pursuance of such agreement, and in consideration of the sum of *one hundred guineas* by the said Guardian to the said Principal, paid at the signing of these presents, the receipt whereof the said Principal doth hereby acknowledge, and from the same sum and every part thereof doth hereby acquit, release and discharge the said Guardian, his executors and administrators, and every of them, he, the said Principal, for himself, his executors and administrators, doth hereby covenant, promise and agree with and to the said Guardian that he the said Principal shall and will accept and take the said Student as his Clerk during the said term, and shall and will, by the best ways and means he may or can, and to the

utmost of his skill or knowledge, teach and instruct, or cause to be taught and instructed, the said Student in the practice and profession of an Attorney-at-Law in such manner as the said Principal now doth or shall at any time practice and profess the same. And also shall and will, at the expiration of the said term, use his best endeavours, at the request, cost and charges of the said Guardian and Student or either of them, to cause and procure him, the Student, to be admitted and sworn an Attorney-at-Law of the Supreme Court of this Colony, provided he, the said Student, shall have well, faithfully and diligently served his said intended clerkship.

In witness whereof the parties have signed these presents, at Cape Town, the day, month and year first aforewritten, in the presence of the subscribed witnesses,

AS WITNESSES:

Affidavit of Attestation.

I, . . . of . . . . make oath and say:

That I was present on the . . . . day of . . . . 19 and saw . . . . sign and execute the annexed articles of clerkship, and that the signatures . . . . . are the true and respective signatures of . . . ., and that the signatures . . . . . attached to the said articles as the attesting witnesses thereto are the true and respective signatures of the said . . . . . .

Sworn at . . . . this . . . . day of . . . . .

Before me . . . . . J. P.

Petition of Colonial Articled Clerks to be examined and enrolled as Attorneys.

In the Supreme Court,

The petition of A.B. . . . . of . . . . humbly sheweth :—

1. That your petitioner was duly articled to W. . . . . of . . . . an attorney of this Honourable Court on the . . . . day of . . . . to serve him as an attorney for a period of three years.

2. That your petitioner has duly served the said period in terms of the said articles of clerkship.

3. That your petitioner has also passed the University Law Certificate Examination as per certificate herewith.

4. That your petitioner is desirous of being examined for his Practical Examination as an attorney and if found competent to be admitted and enrolled as an attorney of this Honourable Court.

Wherefore your petitioner humbly prays that your Lordships may be pleased to give directions for his Practical Examination, and if found competent that your Lordships may further be pleased to admit and enrol him as an attorney of this Honourable Court.

And your petitioner is in duty bound, etc.

(*Affidavit of Verification by Petitioner.*)

NOTE.—*Affidavit by Principal must verify par. 2 of above petition.*

If there has been a break in the articles then paragraph 2 should state it, as for instance :—

That your petitioner has from the . . . . day of . . . . the date of the said articles duly served the said . . . . until the . . . . day of . . . . when (*state the reasons, as for instance*) your petitioner was taken ill, and after being three months in hospital at . . . . your petitioner went, by order of his medical attendant, to England and was absent from the Colony for seven months: that your petitioner returned to the Colony and served his articles with the said . . . . and from that time till the . . . . a period of . . . . your petitioner duly served the said . . . . : that your petitioner has thus served the said . . . . the full period of three years required.

NOTE.—*This must be confirmed by affidavit from the Principal.*

Petition by Foreign Solicitor to be admitted and enrolled here.

(Heading.)

1. That your petitioner is a solicitor, and was on the . . . . day of . . . . duly admitted and enrolled in England to practise as a solicitor, as per annexed Certificate of Enrolment bearing date the . . . . day of . . . .

2. That your petitioner is the person referred to in the said certificate.

3. That your petitioner left England on the . . . . day of . . . . for this Colony; that his name is still on the Roll of Solicitors in England; that he has never been struck off the Roll, nor suspended from practice, nor is there any proceeding pending against him for suspension, nor is there any anticipated.

4. That your petitioner is desirous of being admitted and enrolled as attorney of this Honourable Court.

Wherefore your petitioner humbly prays that your Lordships may be pleased to admit and enrol him as an attorney of this Honourable Court.

And your petitioner, etc.

(*Affidavit of Verification by the Petitioner.*)

Affidavit of Identity.

I, A.B. . . . . of . . . . (*here describe his profession, trade, or calling, or other responsibility, so as to carry weight*) make oath and say :—

That I am well acquainted with . . . . the petitioner mentioned in the foregoing petition, and that I know of my own knowledge that he is a Solicitor duly admitted in England, and that he is the person referred to in the said petition and in the certificate therein mentioned.

Sworn, etc.

NOTE.—*The following is a form of Affidavit I once drew, and which was held sufficient evidence of identity.*

I . . . ., the Roman Catholic Bishop of Cape Town, make oath and say :—

That on the . . . . day of . . . . I received from Lord . . . . a letter introducing the petitioner and stating, *inter alia*, that he, the petitioner, is a solicitor practising at Dublin, but coming out to this Colony in search of health. That I am well acquainted with the handwriting of the said Lord . . . ., and that from interviews I have had with the said petitioner I verily believe he is the person referred to in the said letter, and in the petition and Certificate of Enrolment.

Affidavit, or a Certificate, from the Secretary of the Law Society in England in support of the petition.

(Heading.)

I, A.B. . . . . of . . . . make oath and say :—

1. That I am the Secretary of the Law Society of England.

2. That . . . . was duly admitted and enrolled on the . . . . day of . . . . as a solicitor of the Court of . . . . ; and that his name is still on the Roll of Solicitors.

3. That he has never been struck off the Rolls, nor suspended from practice, and that no complaint of professional misconduct has up to this date been made against him.

Sworn at, etc.

CHAPTER XLIII.

THE DUTIES, OBLIGATIONS AND LIABILITIES OF ATTORNEYS.

It is not my intention here to treat of the history of the office of an attorney, nor can this article be looked upon as more than an attempt to piece together some of the sayings of a few great authors and judges bearing on this subject, and scattered over dozens of books and hundreds of reported cases, and thus to give an attorney, in a sufficient form, some idea of his responsibilities. In most instances I have deemed it best to quote the law in the very words of the authors. My reason for this is partly because the Law Reports quoted are not accessible to the majority of practitioners, and partly because the disciplinary power exercised by the Courts (derived, as I shall hereafter show, from the practice of the Courts, and not necessarily from Edictal decrees or Statutory enactments) is for the most part best expressed and preserved in the words and opinions of their authors.

Before the introduction of the *formulary* process in Rome no person could represent another. By that process it could be done. At first this was done by the person called a "cognitor"; in the course of time by the person called a "procurator." This must be borne in mind by the student who wishes for himself to examine the authorities. The word "Procurator," nowadays frequently translated as "Attorney," had a very much wider connotation in the early Roman period than the term "Attorney" has at the present day. There were, moreover, various kinds of "Procurators"; but in this chapter I shall deal only with that term, in so far as law-suits

are concerned, and where the procedure is vested in the name of the suitor and not in that of his agent.

By the old Roman law every suitor was obliged to appear in person to prosecute or defend his suit; so was it also in England before the Statute of Merton.[1] In both countries afterwards it was for the sake of convenience that suitors were allowed to appear by attorney. Justinian[2] says a procurator is "any one to whom you entrust your case to manage or defend." The English law defines an attorney as "one who is put in the place, stead, or turn of another (attornatus), to manage or conduct his law proceedings or affairs." We shall see below how the word "affairs" is interpreted by the Courts in England regarding attorneys.

In ancient days the profession of an attorney was considered [as "*infamissima vilitas*," servile, of no value, and contemptible. But under the Roman Emperors Diocletian and Maximilian it became an office of respect and good repute. Many people still think at the present day as the ancients did before the period of these emperors. Even Lord Macaulay, the learned historian, who in all his professional career held only one brief, for which he received a guinea, could not refrain from remarking "That *pest* whom mortals call Attorneys." But the present consensus of opinion, all the civilised world over, is that the profession of an attorney is an honourable and respectable one, and to be held in the utmost esteem. An attorney is nowadays an indispensable adjunct to everyone, not only in law-suits but in many other private affairs, and his office is deemed both necessary and praiseworthy. It is essential, therefore, that the relationship between him and the public should be better known; as also what is expected of him, and what his obligations are.

Cicero[3] defines a lawyer as

"a person who has such a knowledge of the laws and customs which prevail in a state as to be able to give answer to questions submitted to him, to act for, and to secure a person in his dealings."

Quintilian, in his Institutes of Oratory,[4] gives Cicero the credit for the saying that, "*the proper object of an adviser is*

[1] 28 H. III., C. 10.
[2] 4, 10, 1.
[3] De Orat., 1, 48.
[4] Bk. 3, Chap. 8, par. 42.

the advantage of him whom he advises." Warren, in his Law Studies, p. 901, says :—

"The greatest proportion of an attorney's employment is wholly irrespective of litigation, which it is his object to prevent, if possible, and never expose his client to the expense and anxiety of a contest in a Court of Law, unless such course were absolutely indispensable."

The same author, in his work on the Social and Moral Duties of Attorneys, p. 16, says :—

"The tone of your professional character intellectually and morally will depend on the estimate which you form of the nature of the duties which you have undertaken, and of the spirit which ought to actuate you."

Van der Linden, in his Judicieel Praktyk,[1] says :—

"Nothing ought to be more holy to an advocate, and an attorney, than never to allow himself to be used in the conduct of cases which he knows to be unjust. He thus guards himself against any inroad which is against the first principles of right, or against the common accepted opinion of jurists. He guards against giving colour to an apparent right which in reality is unjust, and by distortions against his better judgment to lead the judge astray from the paths of truth. And in short he counsels his own conscience and asks himself whether the case is just or unjust. Whoever acts thus will never run the risk of knowingly doing an injustice to his fellow men."

While the laws of Rome and of England hold an advocate not liable for any fault or mistake, or for bad advice, they do not so regard an attorney. By the law of Holland the advocate, as well as the attorney, is liable for his mistakes, but the law is more severe upon the attorney. The reason why is not recorded. The attorney has often to advise on the spur of the moment in the emergencies constantly occurring, yet the client expects him to give a prompt and correct answer at once; while he is content, if counsel has to be consulted, to give a brief for opinion and wait, perhaps, several days for it.[2] The personal responsibility of an attorney is thus very great. Yet he ought not to complain if his notice board proclaims his profession. And just as he expects his doctor to diagnose his complaint correctly, so does the client

[1] Vol. 1, Chap. 8, par. 9.

[2] *Note, strictly private.*—Some political barristers during a Parliamentary Session often keep their clients waiting for a month and more for an opinion, yet the clients are satisfied; but the attorney, poor devil, must decide at once.

expect that his attorney shall at least possess the necessary degree of knowledge of the principles and practice of his profession which will enable him to form a sound and correct judgment. Therefore the law demands that an attorney shall *have a reasonable knowledge of all that pertains to his branch of the profession; that he must know the practical working of the law in all its details.* Pullen, in his Law of Attorneys, p. 197, says :—

"An attorney in a case should bear in mind that he is not the mere hired agent of the party for whom he is retained, to succeed in the case at all hazards. He is bound, at the peril of his character and his office, not only to avoid gross misconduct and blunders, but to conduct himself with integrity and professional decorum."

And again, at pp. 148 and 150 :—

"Attorneys are accountable for the professional discharge of their duties with prudence and discreetness, adequate skill and inviolable secrecy, and in the discharge of their duties they further incur as officers of the Courts in which they are admitted, and as members of an honourable profession, the paramount obligation towards the whole community, of strict integrity, and a careful avoidance of malpractice and chicanery. Upright dealing is a paramount obligation in a legal practitioner . . . the enforcing of this obligation . . . is the settled doctrine and practice of the Courts for summarily dealing with transactions and proceedings tainted with fraud, or brought about by trickery and malpractice on the part of the legal practitioner."

Now, these general remarks may be said to be axioms applicable to all professions and callings of life; but still it is with regard to legal practitioners that they have mostly occupied the attention of the Courts and of the public. The origin and development of these principles I shall now endeavour to illustrate.

Some of the duties of an attorney are by lawyers better understood than can be fully described. There are many canons of duty which have not yet been in print; duty not only to oneself and to one's clients, but also to the Bench and to the public. This duty on the part of an attorney is not a servile thing: he is not bound to do whatever his client wishes him to do. However much an act or transaction may be to the advantage, profit, or interest of a client, if it is tainted with fraud, or is mean, or in any way dishonourable,

the attorney should be no party to it, nor in any way encourage or countenance it. Better far to part with such a client for ever, though he may have been till then "the goose that laid the golden eggs." "Honesty" in law, as in everything else, is always, and after all, "the best policy." The law exacts from an attorney *uberrima fides*, that is the highest possible degree of good faith. He must manifest in all business matters an inflexible regard for truth; there must be a rigorous accuracy in minutiæ, a high sense of honour and incorruptible integrity; he must serve his client faithfully and diligently; he must not be guilty of any unnecessary delay; he must not act in a case which he knows from the beginning to be unjust and unfounded; he must abandon it at once if it appears to him to be such during its progress; he must in no way betray his client to the other side, either by secret correspondence or communications, or in any manner whatsoever; he must duly and faithfully keep the secrets of his client, and on no account disclose them, without the client's consent; he must enter into no compact or agreement with his client to share the fruits of the judgment with him in case of success (*pactum de quota litis*); he must, when reasonable and necessary, communicate with his client on all matters concerning the case, keep his advocate well posted in all the facts, and assist the client and counsel in devising what in any honourable way can tend to the advantage and defence of the rights of the client; he must, when once he has undertaken the client's case, not abandon it without good and lawful reasons or excuse (what these are must depend upon the circumstances of each case); for instance, sickness, absence from the country, mutual enmity, and gross misleading statements made by the client; he must not incur costs unnecessarily, nor take wrong proceedings; he must represent the client in all matters, and do all that is necessary and demanded of him by the case or matter in hand; he must see all judgments properly executed, and look after the whole proceedings till finally completed; he must not initiate legal proceedings against anyone, unless duly authorised thereto by the client. This authority, if not in writing, may be implied from instruction given before either by letter or message, or

may be inferred from previous communications or consultations. It is almost unlimited in the conduct of a case; it may be direct from the client's local correspondent, or be gathered from his correspondence. But if the local correspondent has not the implied authority, he cannot confer it on another. If the authority be disputed, the claim to do what has been done, or is to be done by the attorney, must be clearly established, and be satisfactory to the Court, which in its discretion will decide whether, under all the circumstances advanced, the attorney can be said to have had in the course of his professional duty this implied authority, and was justified in doing what he did, or proposed to do. Even if he acts under a power, he must do his duty to a client, although not expressed therein. Of course, in the absence of any authority whatever, an attorney may, under urgent circumstances, act for another as *negotiorum gestor*, but the grounds for claiming this privilege, and the necessity for it, must be satisfactorily established if required by the opponent or adverse party; and, if necessary, before a summons can be issued, the consent of a Judge must be obtained, who must be satisfied as to the *bona fides* of the application and its necessity, before the client can be communicated with to obtain his formal authority.

All these general duties and obligations will be found fully treated of by the following Roman-Dutch and Dutch law authorities:—Placaat, 20th August, 1531, G.P.B., Vol. 2, p. 703. *Ibid.* 31st May, 1582, p. 790. *Ibid.* 7th June, 1658, p. 1118. *Ibid.* 16th and 28th January, 1659, Vol. 3, p. 679. *Ibid.* 15th December, 1724, Vol. 6, p. 626. Kersteman's Woordenboek Tit. "Procureur." *Ibid.* Academie der Jonge Practicyns, chap. 7. Merula Man. v. Procedeeren 4, 18. Koetze's Van Leeuwen, Vol. 2, chap. 4. Voet trsld. by Buchanan, 3, 3. Vroman's de For. Comp. 2, 4. Gail. Obs. 1, 43. Damhouder Civ. Prac., chap. 85–95. Huber Hed. Regts., Vol. 2, bk. 1, chap. 17. The Bellum Juridicum, 70 and 90. Loenius, 102. Christinæus, 2 Dec. 107–110.

For any point requiring to be more emphasized I shall give the specific references at the end of each paragraph.

It is a significant fact that there is scarcely a decision of

the High Courts in England on the duties and liabilities of attorneys which is not in exact conformity with the general principles of the law of Holland enunciated at a much earlier date; and it is a further fact that the legislative enactments of both England and Holland have for the most part been declaratory of what the law and the practice of the Courts have been regarding the obligations of an attorney, and that Holland legislated thereon centuries before England did. There is practically no, or very little, difference between the laws of England and Holland on this subject. Whenever, therefore, the High Courts of England have given an interpretation to an act or conduct, which by the law of Holland is classed among the acts of misconduct of an attorney, or of conduct which makes him unworthy to be an officer of the Court, and for which he ought to be punished, either by striking his name off the Roll, or by suspension, or by paying costs, or reprimand, or other lighter punishment, such interpretations are law with us also, and are exceedingly valuable, numerous and instructive. Though I have consulted every English authority and reported case on the various points herein discussed, I can do no more than give a few of the leading English decisions to illustrate some of the general principles laid down by the Roman-Dutch law writers. The student who wishes to study the whole of the English law on the subject can best do so from the Law Reports, as the few text-books published are very elementary.

Before a person can be enrolled as an attorney he must take an oath. Some of his duties are defined in the following oath, which before its formal enactment was already in force in the practice of the Courts of Holland—not as an oath, but as the practical requirements of the Court. It is the 71st section of the Placaat of the 20th August, 1531[1]:—

"That he (the advocate or attorney) shall at all times show due reverence and dignity to the judges. That he shall not be engaged in any case which he knows to be unjust, whether the unrighteousness is apparent at the beginning of the suit or comes to his knowledge afterwards. That he shall diligently and faithfully serve his clients. That he will be satisfied with the taxation of the Court. That he will not seek any improper

[1] G.P.B., Vol. 2, p. 703.

excuses or delays. That he will enter into no compact to have a share or part in the case. And, generally, that he will at all times, and everywhere, conduct himself as a faithful advocate or attorney should do."

In former years, in this Colony, the oath was for the greater part similar, but it has been shortened, and is now simply as follows:—"I————, of————, do swear that I will truly and honestly demean myself in the practice of an attorney-at-law according to the best of my knowledge and ability."

An advocate and an attorney can be arbitrarily punished by the Court, if they do not respectfully conduct themselves to the Court.[1] They may not enter into any agreement with their clients for the fees to be paid by them at the termination of a suit whether successful or otherwise.[2] This was to prevent an evasion of the tariff. But under English law, and also with us, there is nothing to prevent an attorney stipulating with his client, not for a share in the spoil to be recovered, but for a specific lump sum as his costs in lieu of a specified bill of costs, or as an allowance at so much *per diem*.[3] But there should be no Champerty or Maintenance; that is, in the former case the dividing of the spoil with the suitor, and in the latter the advancing of money for carrying on the suit and being paid, over and above the legal charges, a sum according to the benefit to the client.[4] Attorneys are prohibited from accosting persons and offering to serve them in legal proceedings, and are ordered to wait till they are asked or requested to act; and so too are they prohibited from taking a case on condition of receiving no money or other remuneration unless the action be won.[5] If an attorney acts fraudulently and with *malâ fides* in the conduct of a case, he is not only to be condemned to make good the loss suffered by the client, but in addition he is to be punished according to the discretion of the Judges.[6] If he fraudulently

[1] Christinæus, Vol. 2, Dec. 99 and 100.

[2] § 58 of the Placaat of the 20th January, 1659, and par. 53 of another Placaat of the same date, G. P. B., Vol. 3, pp. 654 and 680.

[3] *Box* vs. *Brandy*, Hub., 117.

[4] Stephen's Blackstone, Vol. 4, p. 317, 5th Ed.; *Earle* vs. *Hopwood*, L. J., 30 C. P., 217; and *East London Municipality* vs. *Holbard*, 3 J., 140.

[5] Art. 81 of the Placaat of the 20th August, 1531, G. P. B., Vol. 2, p. 703.

[6] Vroman, 2, 4, 9.

makes use of false evidence, he is guilty of *crimen falsi.*[1] To the same effect is also the English law.[2] The punishment to be inflicted on the offending attorney lies in the discretion of the Court or Judge.[3] This power is derived from the Roman law. Ulpian says that the Governors of the Provinces (Præfecti) were in the habit of exercising a disciplinary control over legal practitioners. A man might be debarred either from appearing in the Courts as an advocate (*interdictio advocationibus*), or from legal practice generally (*interdictio foro*), and this applied not only to advocates but also to attorneys (*pragmatici*), and to notaries (*tabularii*).[4] That this power was assumed and exercised also by the Courts of Holland before there was any legislation in that country on the subject, would, apart from authorities on the subject, appear from certain expressions used in some of the Placaaten. Bynkershoek[5] says that "the Courts assumed this power so far back as the year 1250, and like the early Roman Emperors passed sentence according to their discretion." In the Placaat of the 27th September, 1614, regulating the professional conduct of practitioners of the High Court, the 11th Section says that the High Court shall continue to retain (zal blijven behouden) the arbitrary powers of the Court.

The arbitrary power given to the Court over legal practitioners is mentioned in several Placaaten; *e.g.*, arbitrary correction (arbietralijk gecorrigeert);[6] on pain of arbitrary correction (op poene van arbitralijken gecorrigeert te worden) either by suspension from practice or by deprivation of office according to the circumstances of the case and in the discretion of the Court.[7] These principles are still being acted upon by all modern Courts. The only local legislation we have on the subject is to be found in the following: (1) In the Charter of Justice as to admission of attorneys (sec. 21) there is this expression—"Subject always to be

[1] Vroman, 3c, 21.
[2] Phillips on Evidence, Vol. 1, p. 17.
[3] Vroman, Ibid.
[4] Dig., 48, 19, 9, pr. 1-4, by Gothofredus.
[5] De Jur. Priv., Vol. I., Ch. 1 and 2.
[6] Placaat of 20th August, 1531, G. P. B., Vol. 2, p. 703, pars. 52 and 55.
[7] Placaat 31st May, 1582. Ibid, p. 790, pars. 165 and 166; see also Placaat of 19th Dec., 1541, Ibid, p. 1387.

removed by the said Supreme Court from their station therein upon *reasonable cause*"; (2) In Rule of Court 200 as to admission of attorneys in Circuit Courts there is this expression—"Suspension or removal by the Circuit Court for reasonable cause;" and (3) In the Incorporated Law Society's Act,[1] section 22 says:—

"For professional misconduct it shall be incumbent on the President, on behalf of the said Society, to bring the circumstances to the notice of the Supreme Court by application thereto for striking off the Rolls or other punishment of the accused party."

As to what amounts to "reasonable cause" or "professional misconduct" must, in the words of the said Placaat of 1582, be "according to the circumstances of each case—and in the discretion of the Court," who must be satisfied that there are sufficient reasons either for suspension or deprivation of office or other punishment. This arbitrary power of the Courts over legal practitioners was in olden times in some countries very severe. Thus, for instance, we read that in England, it was based on no legal principle whatever of right and justice, and that excessive severity and brutality were the order of the day. But for the last century and a half the tendency everywhere is to leniency and moderation; and at the present day the attorney can certainly nowhere complain that justice is not meted out to him impartially, with a due regard to the gravity or triviality of his offence according to the circumstances of each case.

The Court can, under its general jurisdiction and on its own initiative, order any attorney to show cause why he should not be struck off the Roll.[2] This general jurisdiction is not taken away by our Incorporated Law Society's Act. It is more convenient that the Law Society should take the initiative, but circumstances may arise during the hearing of a case in which an attorney's professional conduct is in question, and the Court or Judge may order him to answer for it without reference to the Law Society, and without complaint lodged from any quarter. Even if the Law Society, for whatever reason, declines to take cognisance of any

[1] No. 27 of 1883.

[2] White on Solicitors, p. 67.

matter or complaint, the Court has still the jurisdiction, in spite of such silence or refusal, to adjudicate upon the matter. In the case of the *Crown* vs. *C*——, the Chief Justice at the Mossel Bay Circuit Court in 1887, not being satisfied with the verdict of the jury, acted upon the evidence and called upon the defendant, an attorney, to show cause at the first day of the sitting of the Supreme Court why he should not be struck off the Roll of Attorneys. This order was served upon him by the Circuit Registrar, and he was, by the Supreme Court, suspended *sine die*. There was nothing however to have prevented the presiding Judge then and there from having struck C—— off the Roll. But as a rule, the Court is loth to exercise this summary power, without some notice to the defendant to be heard in answer to it.[1] So in the case of the *Trustees of Pretorius* vs. *A.B.*, the Court, *suo motu*, ordered notice to be served on the attorney, calling upon him to show cause why he should not be struck off the Roll of Attorneys.[2] The discretion of the Court in each particular case is absolute. In the case of *a Solicitor*,[3] Lord Esher, M.R., said:—

"I think, therefore, that a report by the Incorporated Law Society is not a condition precedent, and that we are not hampered by the fact that there is no report on this case. Then we have authority to act, and we are bound to act."

The attorney is said to be an officer of the Court, because in certain cases the Court has the power to refuse or prevent his admission, and because also, when once admitted, his name is entered on the Roll of Attorneys. The admission being discretionary, it follows that the removal or suspension is discretionary also, but in both instances the refusal to admit and the order to remove depend upon good and sufficient judicial grounds. If a person is unworthy to be admitted as an attorney, the Court can refuse his admission. It can refuse his admission for all causes for which, when once admitted, he could be struck off the Rolls or suspended or otherwise punished.

A summary jurisdiction will be exercised by the Court

[1] B. for 1877, p. 122.
[2] B. for 1876, p. 205.
[3] Weare, 69 L. T., 522.

against an attorney with respect to any misconduct, though it may not have arisen in any suit. The late Sir Alexander Cockburn, Chief Justice of England, said in *Re Hill*[1] :—

"In this case, though the defendant was not acting in the character of an attorney, yet as he is an attorney, the Court is bound to take notice of the matters."

And again :—

"As in the case of a person applying for admission, we are to consider all circumstances, and either have refused to admit, or to keep suspended for a period the time of admission, so when a party has once been admitted, we are bound to take notice of a similar act of misconduct committed by him, though he was not acting in the precise character of an attorney at the time."

So also Lord Justice Blackburn, in the same case, said :—

"I adhere to what I think is the effect of Blake's case,[2] that although the misconduct is not directly or incidentally connected with his character of an attorney, still we must consider what effect it has upon his being a proper person to be an officer of the Court. . . . The offence morally may not be greater, but still, if it is committed in the character of attorney, it is more dangerous to the suitors, and should be more severely marked."

When an undertaking is given by an attorney as such, the Court will compel him to perform it, whether it relates to the conduct of an action or suit, or extends to matters wholly outside his strict duty as an attorney. And if it appears that an undertaking is given by an attorney, whilst acting in that character, it is immaterial whether he formally appear as an attorney in the suit, or be merely professionally employed to compromise.[3] So in the case of *Dixon* vs. *Wilkinson*,[4] Lord Justice Turner said :—

"I am of the opinion that the Court has jurisdiction to charge solicitors with losses sustained by their clients from their misconduct in the prosecution of suits. Solicitors are officers of the Court, and must generally be responsible to it for the due discharge of the duties which they undertake. The Court has constantly exercised this jurisdiction in cases of malfeasance. . . . When, for instance, a solicitor has used the name of a party without authority, it is almost a matter of course to order the solicitor to pay the costs incurred by the party in consequence of his name having been so used. Whether this jurisdiction, which undoubtedly

[1] 18 L. T., 564.
[2] 3 E. and E., 34.
[3] *Burnell* vs. *Proois*, 22 L. T., 543; *Stephens* vs. *Hill*, 6 Jur., 585.
[4] 4 De., G. and Jo., 509, quoted in *Dangar's Trust*, Vol. 60, L. T., 496.

exists, in case of malfeasance, extends to cases of mere neglect, I think it is unnecessary for us in this case to decide, and I am not satisfied that in principle any sound distinction can be drawn about cases of malfeasance and cases of nonfeasance, and looking to what was said by Lord Eldon in Jolland's case[1] . . . I strongly incline to the opinion that the jurisdiction is not limited to cases of malfeasance, but also extends to cases of mere neglect. I think, however, that although the Court may possess this jurisdiction, the exercise of it must of necessity be rare, for the Court will not of course exercise it unless it can do complete justice."

So also in the case of *Bathen* vs. *Wedgewood Coal and Iron Company*,[2] Judge Pearson said:—

"He (the solicitor) was acting as an officer of the Court, and in that character, I conceive, he was liable to the Court for the due discharge of his duty. Until I am corrected by a higher tribunal I shall hold that the Court has a summary jurisdiction to make a solicitor liable for not properly discharging his duty under such circumstances."

In the case of *Dangar's Trusts*,[3] Judge Stirling said:—

"The liability of Mr. N—— is undoubted, and that he is liable for the consequence of his neglect to inform the Court as to the true title of the fraud, which title he must be taken to have known, and for the misrepresentation which he made in the petition which he prepared and presented to the Court as solicitor on record of Mrs. N—— and the Trustees. The next question is, whether that liability ought to be enforced in a summary way, or by means of an independent action. I think that the weight of authority is strongly in favour of enforcing the liability on the present occasion, for the Court can see that no injustice will be thereby occasioned to the solicitor."

Again Lord Russell, Chief Justice, in *Nash* vs. *Joseph*,[4] said:—

"Where negligence or other breach of duty is omitted by a solicitor, an officer of the Court, in a matter in which the Court has seizen, the Court may, and if it can do full justice, will, summarily order its officers to make good the loss occasioned by neglect or breach of duty. But the limit of liability is the measure of the loss flowing from the negligence or breach of duty. The Court cannot, merely because the officer has been guilty of misconduct, mulct him in damages. The damages must flow from the act of negligence or misconduct.".

So too in the case of *String* vs. *Howe*,[5] where an attorney had received some money in a professional capacity, and the

[1] 8 Ves., 72.
[2] 54 L. T., 245.
[3] 60 L. T., 491.
[4] 75 L. T., 558.
[5] 1 Str., 621, quoted in *Stephens* vs. *Hill*, 6 Jur., 585, and Anon., 10 Jur., 198.

Court of Queen's Bench ordered him to pay over to the parties entitled to it, saying that they would oblige all attorneys to perform any trust which might be reposed in them in virtue of the confidence which the character of the attorney produced in the mind of the client; and ever since that time (the beginning of this century) applications of a similar nature have been very common in all cases, where an attorney in his professional capacity has received money, for which, although he might be made accountable in a civil action, the Court will compel him to do summary justice without putting the client to the necessity of bringing one. Similar to this was the case of *Beevis* vs. *Hulmer*.[1]

Though, as a general rule, conviction for a criminal offence is a good ground for striking an attorney off the Roll, yet the Court in its discretion, and according to the circumstances of the case, can refuse to strike him off or to suspend him. Thus in the case of *Re a Solicitor*,[2] Baron Pollock said:—

"The mere conviction is not binding upon the Court in a case of this kind; but the Court can, may, and ought, to enter upon and weigh all the facts of the case, including any extenuating circumstances that exist in favour of the solicitor."

Lord Justice Lopes in *Re Weare*[3] said:—

"It is perfectly clear that the mere fact that a person has been convicted of a criminal offence does not make it imperative on the Court to strike him off the Roll. There are criminal offences and criminal offences. For instance, we can imagine an assault of such a disgraceful character that it would make it incumbent on the Court to strike the attorney off the Roll. On the other hand, one can imagine an assault arising to some extent out of a quarrel of much less serious character, where, in all probability, the Court will not think it its duty to interfere. Again, there are libels and libels, some of which would compel the Court to act under the plenary power it possesses, others where the Court would hesitate before it so acted."

See also the cases cited in *Re Hill*.[4]

By the Roman law legal advisers were prohibited from giving evidence, for or against their clients, of communications between them.[5] The Roman-Dutch law adopted this, and

[1] 15 M. & W., 88.
[2] 61 L. T., 842.
[3] 69 L. T., 522.
[4] *Supra*, and also *Stephens* vs. *Hill*, 6 Jur. 585.
[5] Dig., 22, 5, 25, by Gothofredus.

added that the communications with legal advisers should be as inviolable and as sacred as the confessions made to a priest.[1] The later Roman-Dutch law writers, and the decisions of the Courts of England, carried this doctrine still further. And at the present day the laws of England and Holland are the same on this subject, though of course in England there are many more precedents to be found. The law now is that no legal adviser is permitted, whether during or after his employment as such, unless with his client's express consent, to disclose any communication made to him as such legal adviser, or to disclose any advice given by him to his client. This privilege is established, not for the benefit of the attorney but for the protection of the client, and does not cease with the termination of the particular engagement, but remains for ever sealed unless the client himself chooses to remove it. It is not removed even by the client's death. This seal of secrecy is not only binding on the attorney but extends also to all the necessary means by which such communications are effected, such as local attorneys, agents, interpreters, and clerks. This rule of secrecy does not apply to everything that passes between a client and his attorney, but only to what passes between them in professional confidence. Nor does it apply to any communication made in the furtherance of any criminal purpose, as this can never be part of a legal adviser's business. As soon as a legal adviser takes part in a fraudulent transaction, or becomes engaged in a conspiracy he is no longer a lawyer but a *particeps criminis;* and no Court can permit it to be said that the countenancing of a fraud or crime or conspiracy can form part of the professional occupation of a legal adviser. Thus, if by his conduct the attorney becomes party to any nefarious transaction, no knowledge or information he may have obtained from his client will be privileged.[2] In *Re Cutts*[3] Mr. Justice Blackburn said:—

"Those things which an attorney hears, or his client, or in consequence of his employment by his client, he is forbidden to disclose,

[1] Voet, 22, 5, 6; Van Leeuwen's Cen. For., II., I., 21.

[2] Stephen's Law of Evidence, Arts. 115 and 116. Taylor's Law of Evidence, 5th Ed., Vol. 1, p. 807, pars. 834–860.

[3] 16 L. T., 715.

and any betrayal of his confidence would be visited by the Court as gross misconduct . . . ."

Mr. Justice Lush said:—

"The Court has interfered where the solicitor has betrayed his client's secrecy, because the client is entitled to have these secrets kept, and the attorney is not permitted by the Court to disclose them. Yet this only applies where the secrets disclosed have come to the attorney's knowledge in virtue of his relation of attorney."

Mr. Justice Blackburn said:—

"The Court will exercise its summary jurisdiction where in any matter an attorney has committed some crime, not necessarily an indictable crime, but still of such a character as to render him unfit to continue an attorney at all."

It would be no excuse for an attorney to say that he did not act in his capacity as attorney, or as legal adviser, or in any capacity whatever, in order to escape liability at the suit of the client, or punishment at the instance of a complainant or of the Court. The fact of his having done a wrong is sufficient, for the ends of justice, to render him as liable and punishable as if he were formally acting as an attorney. The only difference is that when he is employed in a matter wholly unconnected with his professional character, the Court will not, except in extreme cases, act against him in a summary manner; but where the employment is so connected with his professional character as to afford a presumption that his character as attorney formed the ground of his employment by the client, then the Court will exercise this summary jurisdiction over him.[1]

This disciplinary power over legal practitioners exercised by the Courts from the earliest Roman period, and the discretionary power of punishments accompanying it have, in course of time, developed into the power of summary jurisdiction and summary punishments not only in all matters affecting professional misconduct, but, in this century, in all matters also which may affect an attorney as an officer of the Court. So that it has frequently happened that when the Court could not punish an attorney for a wrong done in his

[1] Taylor on Evidence, 5th Ed., Vol. I., § 835, n. 2.

professional capacity, they have punished him for that wrong as an officer of the Court. But we must keep in view the distinction between the summary power of the Court with respect to a wrong done as an attorney, or to conduct unworthy of an officer of the Court, and the rights of the client for his remedy. The Court's power is apart from the client's remedy. The Court's jurisdiction is summarily to punish, in its discretion, a wrong or a disgraceful act done by the attorney *as an officer of the Court;* and even though he may not be liable or punishable by the Court in his capacity as an attorney, or as an officer of the Court, he may yet be liable to be sued by his client under the general term of agency, or by the rules of mandate, either as *negotiorum gestor*, or by a mandate express or implied.[1]

I have stated that only *in extreme cases* will the Court exercise its summary and discretionary powers over an attorney for a wrong done wholly outside of and unconnected with his professional capacity. The Court's jurisdiction is therefore not limited to charges of unprofessional conduct or to criminal actions, but it considers everything which may make a solicitor unfit to continue an officer of the Court.[2] Thus in the case of *Weare*[3] it is reported that Lord Mansfield said of another case:—

> "It is not by way of punishment that the Court can in such cases" (stealing a guinea) "exercise their discretion whether a man whom they have formerly admitted is a proper person to be continued on the Roll or not—and we think he is not a fit person to be an attorney."

So in the same case it is reported that Lord Ellenborough remarked in another case (where a person threatened to proceed against another in order to extort money):

> "The defendant was a very improper person to remain as an attorney on the Roll of the Court."

So again in *Stephens* vs. *Hill*[4] Lord Abinger said:—

> "Now an attorney, who has been guilty of cheating his client or the opposite party in such a manner as to render him indictable, is unfit to be allowed to remain on the Roll, or to practice in any Court."

[1] Cod., 2, 13, 5-12; Dig., 3, 3, 5-14, and 43.
[2] White on Solicitors, p. 68.
[3] 69 L. T., 522.
[4] 6 Jur., 585.

In the case of *Hill*[1] Chief Justice Cockburn said :—

"When an attorney does an act which involves dishonesty, it is for the interest of suitors that the Court should interfere to prevent a man guilty of such misconduct" (embezzlement, though no prosecution followed) "from acting as an attorney of the Court."

In the case of *Weare*, quoted above, he was struck off the Rolls because he had knowingly let his houses and allowed them to be used by his tenants as brothels. This offence had no relation to his character as solicitor. Lord Esher, M.R., said :—

"All these cases seem to show that it is not necessary that the offence . . . . should be committed in the character of an attorney. The question is whether it is such an offence as makes it unfit that he should remain a member of this strictly honourable profession."

Lord Justice Lopes in the same case said :—

"It appears to me that to hold that the jurisdiction of the Court to strike off the Roll extends only to professional misconduct and neglect of duty as a solicitor, would be placing too narrow a limit on that most salutary disciplinary power that the Court exercises over its officers. To my mind the question which the Court in cases like this ought always to put to itself is this :—Is the Court, having regard to the circumstances brought before it, any longer justified in holding out the solicitor in question as a fit and proper person to be entrusted with the important duties and grave responsibilities which belong to a solicitor?—Now it is beyond doubt that the jurisdiction of the Court extends not only to cases where the misconduct is connected with the profession of the solicitor, but also to cases where the conduct has been such as to make it clear to the Court that that person ought no longer to be held out as a fit and proper person to exercise the important functions with which the Court entrusts him."

For any wrong the client may have suffered through the neglect or other blamable conduct on the part of his attorney he has his remedy against him for damages. This relief he has whether the conduct of the attorney amounts to unprofessional conduct or not. Thus by the Placaat of the 7th June, 1658,[2] it is provided that—

"If any person has been injured by the neglect, delay, or misconduct (wandevoiren) of any attorney, the attorney would be liable to him for any damages sustained, irrespective of any penalty or judgment the Court might impose."

[1] 18 L. T., 564.

[2] Vol. II., p. 1102, § 37.

So also by the Placaat of the 12th October, 1663,[1] it is provided that—

"Apart from any punishment by the Court, such as suspension from practice, a suitor has an action for the damages and the injury sustained by him, by reason of the mistake made by the attorney."

Again by the Order V.D. Hooge Raade, by Placaat of the 7th January, 1658, Art. 46, by the Prov. Orde of the 21st October, 1669, and of the H. Raade of 1st May, 1681, it is provided that "a client who may have suffered through the neglect, delay, or misconduct of his advocate or attorney has an action against him." If a case has been neglected or delayed by the attorney through inattention and improper management of it, the client has an action against him; and if by the fraud or neglect of his attorney the principal has been defeated in the instituted cause, or sustained other damage which might have been avoided by the more exact diligence of the attorney, the latter is to be condemned to repair the whole loss.[2]

An attorney is not entitled to any costs when, through his negligence, the services rendered by him have become wholly useless to the client; for instance, in proceedings which fail for want of proper precautions on his part, or which, though at first advantageous to his client, are afterwards rendered abortive by his own neglect. Neither is he entitled to any remuneration when the work is not only useless but prejudicial to the client; nor can he recover from his client any unnecessary expenses unless incurred by the client's order. Again, when the action has been commenced in a wrong form, and when he might reasonably be presumed to have known better, he should not claim any remuneration for his services; nor when he has proceeded without any authority, or in the name of a client who is dead, as death cancels a power to sue or defend.[3] But the degree of negligence, or want of prudence, or useless work, must depend upon the nature of each case. Moreover, when he has improperly advised, commenced, conducted, or defended any action for

[1] Vol. 2, p. 3053.

[2] Merula, 4, 18, 1, 3; Vroman, 2, 4, 9; Gail, 1, 45; Neostadius, 85; Christinæus, 2, 13, Dec. 107–110; Voet, 3, 3, 17.

[3] *Hartley* vs. *Pompart*, 1 M., 400; *Bayley* vs. *Buckland*, 1 Exch., 1; *Hoskins* vs. *Philips*, 16 L. J., 339 Q. B.; *Gas Company* vs. *Armstrong*, 13 Ch. D., 310.

an insolvent estate, or incurred any unnecessary expense therein, he is liable to pay the costs of such action.[1]

An attorney is however bound to use reasonable care and skill in managing the business of his client. He cannot shirk his responsibility in matters peculiarly applicable to his branch of the profession by showing merely that he acted under the advice of counsel.[2] The late Dr. Warren, Q.C., says[3]:—

"The circumstance of an attorney having acted upon the advice of experienced counsel will go far to exempt him from the imputation of gross negligence, but the client is not without redress if the attorney's own presumed knowledge ought to have been sufficient."

And so also the late Chief Justice Tindall, in giving judgment in the case of *Godefroy* vs. *Dalton*[4] gave the following exposition of the nature of the attorney's liability for negligence:—

"It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appear to satisfy his undertaking, and that *crassa negligentia* or *lata culpa* mentioned in some of the cases for which he is undoubtedly responsible. The cases, however, which have been cited and commented upon at the Bar, appear to establish in general that he is liable for the consequences of ignorance or non-observance of the rules of practice of his Court, for want of care in the preparation of the cause for trial or of attendance there with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession: whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice and doubtful construction, or of such as are usually entrusted to men of the higher branch of the profession of the law. We lay no stress upon the fact that the attorney has consulted his counsel as to the sufficiency of the evidence, because we think his liability must depend upon the nature and description of the mistake or want of skill which has been shown, and he cannot shift from himself such responsibility by consulting another when the law would presume him to have the knowledge himself."

Lord Mansfield, in *Pitt* vs. *Yalden*,[5] says:—

"That part of the profession, which is carried on by attorneys, is liberal and reputable, as well as useful to the public, when they conduct them-

[1] § 58, Insol. Ord. No. 6 of 1843.
[2] *Andrews* vs. *Hawley*, 26 L. J. Ex., 323.
[3] Law Studies, p. 922.
[4] 6 Bing., 461, reported at p. 181 of Warren's Duties of Attorneys.
[5] 4 Burrows, 2061, quoted at page 184 of Warren's Duties of Attorneys.

selves with honour and integrity; and they ought to be protected when they act to the best of their skill and knowledge. But every man is liable to error; and I should be very sorry that it should be taken for granted that an attorney is answerable for *every* error or mistake, to be punished for it by being charged with the debt, which he was employed to recover for his client, from the person who stands indebted to him. A counsel may make a mistake as well as an attorney. Yet no one will say that a counsel, who has been mistaken, shall be charged with the debt. The counsel indeed is honorary in his advice and does not demand a fee. The attorney may demand a compensation. But neither of them ought to be charged with the debt, for a mistake. Not only counsel but Judges may differ or doubt or take time to consider. Therefore an attorney ought not to be liable in cases of reasonable doubt."

Warren[1] says (when discussing the tacit contract of an attorney with the public on his entering his profession) :—

"The law declares that you have pledged yourself *to exercise reasonable skill and diligence*, to exhibit perfect integrity, and a breach of this contract may occasion you most bitter mortification, exposure, censure by the Judges in open Court before keen rivals, and the necessity of making ruinous reparation to your client."

Lord Campbell, in a case before the House of Lords,[2] says :—

"In an action such as this by a client against the professional adviser, to recover damages arising from the misconduct of the professional adviser—I think the law must be the same in all countries where law has been considered as a science. The professional adviser has never been supposed to guarantee the soundness of his advice. . . . Though an action may be maintained against the attorney. . . . it is only if he has been *guilty of gross negligence*, because it would be monstrous to say that he is responsible for even falling into what must be considered a mistake. You can only expect from him that he *will be honest and diligent;* and if there is no fault to be found either *with his integrity or diligence*, that is all for which he is answerable. It would be utterly impossible that you could ever have a class of men who would give a guarantee binding themselves, in giving legal advice and conducting suits at law, to be always in the right."

The last important English decision on the subject is by the late Lord Coleridge, C.J., in the case of *Marks* vs. *Rae*[3] :—

"It" (he says) "was an action charging a solicitor, who since the commencement of the action had died, with negligence in connection with certain legal transactions for the conduct of which the plaintiff had retained him (the defendant) in his professional capacity. There was no

[1] Duties of Attorneys, pp. 12, 13.
[2] Storey on Agency, p. 21.
[3] L. T. Journ. of 21st November, 1885, p. 48.

doubt that any special professional man or expert, such for instance as a doctor, a lawyer, or an engineer, undertook with those who employed him to discharge whatever duties he had been specially retained for with all the competent care, skill and diligence that could be reasonably expected of him under the circumstances of each particular case. This was all he was bound to do, and although the result was failure, no action for negligence would lie against him. That such an action should lie he must have been guilty of some gross breach of duty. This principle was so clearly laid down by Lords Brougham, Campbell, and Lyndhurst, than whom no more able judges ever graced the Bench, that he would read to the jury what they had said on the point in *Purvis* vs. *Landell*.[1] Lord Brougham, in his judgment therein, having explained the nature of the plaintiff's claim in that action, continued: 'It is the very essence of this kind of action that it depends, not upon his having received, if I may so express it in common parlance, bad law from the solicitor, nor upon the solicitor or attorney having taken upon himself to advise him, and having given erroneous advice, advice which the result proved to be wrong, and in consequence of which error the parties suing under that mistake were deprived and disappointed of receiving a benefit. But it is of the very essence of this action that there should be a negligence of a crass description, which we call *crassa negligentia;* that there should be gross negligence; that the man who has undertaken to perform the duties of an attorney, or of a surgeon, or an apothecary (as the case may be), should have undertaken to discharge a duty professionally for which he was very ill qualified, or, if not ill qualified to discharge it, which he had so negligently discharged as to damnify his employer, or deprive him of the benefit which he had a right to expect from the service.' That is the very ground Lord Mansfield has laid down in that case to which my noble and learned friend on the Woolsack has referred a little while ago, and which is also referred to in the printed papers. It was still more expressly laid down by Lord Ellenborough in the case of *Blaikie* vs. *Chandless*,[2] because there Lord Ellenborough uses the expression: 'An attorney is only liable for *crassa negligentia*. Therefore the record must bring before the Court a case of that kind either by stating such facts as no man who reads it will not at once perceive, although without its being alleged in terms, to be *crassa negligentia*—something so clear that no man can doubt of it; or, if that should not be the case, then he must use the very averment that it was *crassa negligentia*. . . .' Lord Lyndhurst in his turn had also said in that case: 'When such an action is brought against a solicitor, he is liable merely in cases where he has shown a want of reasonable skill, or where he has been guilty of gross negligence, or a case of breach of duty.'"

In the case of *Van der Spuy* vs. *P——*[3] the Chief Justice said:—

"I do not dispute the doctrine that an attorney is liable for negligence and want of skill. Every attorney is supposed to be reasonably proficient

[1] 12 Clark and Finn., 97. [2] 3 Camp., 17. [3] B. for 1875, p. 133.

in his calling, and if he does not bestow sufficient care and attention in the conduct of business entrusted to him, he is liable, and when this is proved the Court will give damages against him."

In the case of the *Orphan Chamber* vs. *T*——[1] our Supreme Court held that the claim against an attorney for damages for misconduct should be by action and not by motion.

But in all matters against an attorney for misconduct or unprofessional conduct the proceeding is by notice of motion to show cause why he should not be struck off the Roll of Attorneys, stating the grounds for and supporting this motion by an affidavit of the facts. As a rule this notice and affidavit must be served personally on the attorney, but when this cannot be done the Court may direct substituted service, or publication in any other manner. Thus in England service was ordered at the defendant's last known place of residence.[2] In this case Chief Justice Erskine said :—

"The notice of this description to be served either personally on the party or at his known place of business. But as it is sworn that he has no place of residence in this country, you may take a rule for substituted service of the order *nisi* at his last known place of residence."

So in this Colony, where it was known that the attorney had absconded and could not be personally served, the Court ordered publication in one of the English papers in Cape Town.[3]

The discretion of the Court as to striking off the Rolls for ever, or suspension for a time or *sine die*, or any other lesser punishment, is absolute. Thus for contempt of Court in England the attorney was struck off the Rolls altogether.[4] An attorney was struck off the Rolls for having unduly influenced or tampered with the witnesses.[5] In this case Lord Abinger said :—

"I cannot conceive how any attorney . . . can be justified in using any influence, directly or indirectly, for the purpose of preventing a witness who has been subpœnaed by an adversary from coming forward to give evidence."

[1] 1 M., 452.
[2] *Re Mark*, 4 Dean and Chitty, 23.
[3] *Incorporated Law Society* vs. *M*——, 5 C. T., 448, and 6 C. T., 85.
[4] *Re A.*, 36 L. T., 113; see also *re Mant*, *infra.*, and *re Townley*, 3 Dowl., 40; *re Grant*, Ibid, 320; *re Burgin*, 1 Dowl. (N.S.), 292.
[5] *Stephens* vs. *Hill*, 1 Dowl. (N.S.), 669, and 6 Jur., 585.

An attorney was struck off the Rolls for packing a jury.[1] An attorney was suspended for ten years for allowing a client to put a false date in an affidavit.[2] And another attorney was punished with a fine of £100 and suspended for three years for making a false affidavit of increase in the taxation of his bill of costs.[3] In this case Baron Bramwell said :—

"Because in the affidavit he stated that witnesses had been subpœnaed in each action and conduct money had been paid to each of the witnesses, whereas in truth in one action only had they been subpœnaed and in only one had conduct money been given. For the mistake or error, or wrong in the affidavit" (the accused having offered the excuse that he did not know it was true) "the result is that the Court adjudges you to be guilty of the contempt in attempting to impose on us . . . and for that contempt we fine you £100. For your malpractice . . . the Court sentences you to be suspended from practice for three years."

And though an attorney might have been indicted for an offence, but was not, the Court could still have struck him off the Rolls ;[4] as also in a case where an attorney was found not guilty by the jury.[5]

So also with us the Court has exercised similar powers of discretion. In the case of M. (for not paying over to the clients debts collected by him) he was struck off the Roll.[6] In the case of A. (for theft) he was first suspended for twelve months,[7] then after that re-admitted, and on a second offence of theft was struck off the Rolls entirely.[8] In C.'s case (for theft and fraud, though acquitted by the jury) the Court suspended him (in 1877), and ordered that he was not to apply for re-admission until after the lapse of three years ;[9] and when thereafter (1882 or 1883) he applied for re-admission, the Court refused the application, and he has not applied since. In this case the Chief Justice said :—

"It is quite clear an attorney may be struck off the Roll for misconduct which does not amount to a crime ;"

[1] Hanson's case, Moor, 882, and 1 Brownt., 44.
[2] *Re Gray*, 20 L. T., 730.
[3] *Re Mant*, 5 L. T., 254.
[4] *Stephens* vs. *Hill*, 6 Jur., 585.
[5] *Re C.*, *infra*.
[6] 5 C. T., 488, and 6 C. T., 85.
[7] 1887, not reported.
[8] 3 C. T., 294.
[9] B. for 1877, p. 122.

And Denyssen, J., said :—

"An attorney is an officer of the Court, and the Court must protect the public, not only when an attorney commits a crime, but when he is guilty of improper conduct."

In the case of W. (for theft) he was suspended with an injunction not to apply for re-admission within three years;[1] after the lapse of this time he applied for re-admission, and was re-admitted (1898). B. (for culpable insolvency) was suspended on the same terms.[2] P. for what amounts to champerty suspended on same terms.[3] M. (for theft) suspended on the same terms.[4] P. (for not paying over client's money) suspended for two years[5] was thereafter re-admitted.[6] L. (for theft of £4) suspended on same terms for six months.[7] M.[8]; S.[9] ordered to pay costs only. G., though successful, got no costs.[10] V. for high treason struck off the Rolls in 1900. B. for the same offence in 1901 also struck off; and V. d. H. in 1901 for fraudulent insolvency also struck off.[11]

But after an attorney has been struck off the Court has jurisdiction to re-enrol him, because the striking off is regarded as not necessarily permanent, but merely as a suspension, leaving the Court the discretion to re-admit him or not. In order, however, to be re-admitted, after being struck off, he must make out a very strong case to induce the Court to grant the application. This depends upon all the favourable circumstances the applicant can bring before the Court as justifying his re-enrolment. It is thus purely discretionary with the Court, who will take into consideration the length of time that has elapsed since he was struck off the Roll; the reparation he has made for his offence; his subsequent conduct and behaviour; and the nature of his employment subsequently; all of which must be satisfactorily proved.[12] In the case of *re a Solicitor*, in some reports put as

[1] 4 C. T., 397.
[2] 5 C. T., 372.
[3] In Feb., 1885, not reported, but particularly mentioned in *East London Municipality* vs. *Halberd*, 3 J., 140.
[4] 6 C. T., 7.
[5] In July, 1886, not reported.
[6] In 1888, not reported.
[7] 7 C. T., 12.
[8] January, 1884.
[9] June, 1884, neither of which is reported.
[10] 6 C. T., 8.
[11] None of these three is reported.
[12] White on Solicitors, pp. 41–43 and 67, and the references; and *re Rex* vs. *Greenwood*, 1 W. Bl., 222.

re Weare,[1] Lord Esher, M.R., said in the Court of Appeal in England :—

"He is struck off the Roll, but, if after an honourable career of such length as to convince the Court that there has been a perfect and actual repentance, and that he is no longer guilty of anything disgraceful, and that his conduct is honourable, the Court, upon such evidence, will have the right and the power to restore him to the profession. His case is not hopeless, therefore, and at present he must be struck off the Roll."

An advocate, as well as an attorney, who has been either struck off the Roll or suspended, for however short a period or for whatever trivial offence, has the right of appeal to a higher Court, and even to the Privy Council. Should the lower Court refuse an appeal, the Privy Council can always entertain it.[2]

An attorney may at his own instance petition to have his name struck off the Roll. But he must give the Court some good reason for it, as otherwise his object may be to avoid an enquiry which would subject him to the summary power of the Court if his name were still on the Roll. In England there are many instances of such application to the Court, some of which have been granted, others refused, according to the circumstances of each case. In support of his petition he must make an affidavit to the effect that there are no proceedings pending against him to have his name taken off the Rolls, and that he expects none.[3] So in the case of *de Jongh*[4] the Chief Justice said :—

"The application (to be struck off the Roll) will be granted subject to another affidavit to the effect that there is no complaint pending against him as an attorney or notary."

In this Colony we have had only one application, as far as I know, from an attorney to be struck off the Rolls, and one from a notary. The former case is that of Mr. de Jongh,[5] who petitioned the Court to have his name taken off the Roll of Attorneys, to enable him to enter at the Inner Temple, as

[1] 69 L. T., 522.

[2] *Re Harwick*, 49 L. T., 584; *re Moncton*, 1 Moo. P. C. C., 455; *Emerson* vs. *The Judges of Newfoundland*, 8 Moo. P. C. C., 157. See *Dowris* vs. *Arrindell*, 3 Moo. P. C. C., 414. See also McPherson's Practice of the Privy Council, pp. 1–40.

[3] *Re Gray*, 9 Dowl., 336, and *re Anonymous*, quoted in *Ex parte Stokes*, 1 Chit. Rep., 556–559.

[4] 6 C. T., 85.

[5] *Supra*.

required by the rules, and qualify as a barrister. In the case of the *Notary W.*,[1] he petitioned to have his name taken off the Roll of Notaries, but as during the hearing of the motion it came to the knowledge of the Court that he had been convicted of embezzlement and sentenced to twelve months' hard labour, the Court refused his petition, and ordered a rule *nisi* to be served on him to show cause why he should not be struck off the Roll for the criminal offence. He was thereafter struck off by reason of the conviction.

In the case of Mr. Longden,[2] whose name was on the Roll both as advocate and as attorney, he petitioned the Supreme Court to have it declared that notwithstanding the fact of his being an advocate he was not disqualified from practising as an attorney at a place where he did not intend to practise as an advocate; or, if not granted, to have his name taken off the Roll of Advocates. The Court decided that his enrolment as an advocate tacitly cancelled the enrolment as an attorney, and, as his application was *bonâ fide*, his name was removed from the Roll of Advocates and restored on the Roll of Attorneys.

One of the obligations of an attorney I have reserved for the last, and with it I shall close this Chapter. It is this; his duty to instruct his articled clerks. I have not been able to find any *decision* upon the question of an attorney's duty in this respect. But it is so obvious as scarcely to admit of argument. Common sense and justice demand it. Usually it is provided for in the Articles of Clerkship, under the words "*Shall instruct or cause to be taught and instructed in the profession of an attorney, &c.*" The 149th Rule of Court says the clerk "shall have been during the whole of such time (*i.e.* five years, now three) *instructed* in the knowledge and practice of the law by such barrister or attorney, &c." The 150th, 151st and 152nd Rules also refer to "instruction." As at the time these Rules were published (1828 and 1829) there was no examination of any kind but *service* only was required, it is evident that the "instruction" referred only to the law and practice of usual occurrence in an attorney's office. But even with the introduction of the various

[1] In 1869, not reported. [2] 7 C. T., 398.

examinations in recent years, mentioned in the previous Chapter, the question has not yet been judicially decided either in England or here to what extent the principal is bound to instruct his pupil. But, though I have found no decision on the point, I have come across the views of two eminent writers in favour of it. The one an excellent Roman-Dutch law authority, Kersteman; the other an English authority, Warren, Q.C. Kersteman, in his "Academie der Jonge Practicyns," Chap. 7, says:—

"The attorney must give the necessary instructions to his clerk, that he may acquire a knowledge of, and become well acquainted with, the principles and practice of his profession."

While Warren, in his "Moral, Social and Professional Duties of Attorneys," p. 214, says:—

"You (the attorney) are charged with the duty of teaching him (the pupil) a profession, and you must not shrink from the task. If you have not sufficient business in your office to occupy his attention fully, you should seek to compensate for the deficiency by oral instruction, by personally directing his studies, and from time to time ascertaining his progress."

It follows that if the principal cannot instruct his articled clerks owing to want of work, he should do the next best thing, viz.: give them imaginary cases to deal with; and if he is so fully occupied as to have no time to attend to them, he should employ others to do so, himself supervising the work at reasonable intervals, as he cannot wholly divest himself of this necessary obligation. For just as he can call upon them to fulfil their part of the contract, so can they require him to fulfil his: each, of course, within reason. The requisite degree of personal superintendence on the part of the principal must vary with the circumstances of each case.[1]

[1] See also *re Duncan*, 10 L. T., 337; *re Smith*, 33 L. J. Q. B., 191; *re Mills*, 5 B. & S., 341.

Notice to be struck off the Rolls.

In the Supreme Court, etc.,

Between

The Incorporated Law Society

Applicant,

and A.

Respondent.

Sir,—Take notice that application will be made to this Honourable Court by motion on behalf of the above applicant on the . . . . day of . . . . 1902, at 10 o'clock in the forenoon, or so soon thereafter as Counsel can be heard, at which time you will be required to shew cause, if any, why your name shall not be struck off the Rolls of Attorneys and Notaries of this Honourable Court, by reason of your professional misconduct (*here state the cause complained of, as for instance*) in that you were on the . . . . day of . . . . tried at . . . . Court for the crime of High Treason, found guilty thereof, and sentenced to . . . . years' imprisonment with hard labour.

And to shew cause further why you shall not hand up to and place in the custody of the Registrar of this Court your appointments as Attorney and Notary; and to shew cause also why you shall not be ordered to pay the costs of this application.

Dated at C. . . . . T. . . . . this . . . . day of . . . . 1902.

. . . . . .

Applicant's Attorney.

To A.

of . . . . . .

The above Respondent.

Affidavit in support of foregoing motion.

(Heading.)

I, B. . . . . of . . . . make oath and say—

1. That A. . . . ., the above Respondent, is an Attorney and Notary of this Honourable Court.

2. That at the Criminal Sessions of the Circuit Court of . . . . held on the . . . . day of . . . . the said A. was on the Indictment annexed hereto found guilty by the Jury and sentenced by the presiding Judge to imprisonment with hard labour for a period of . . . . years, as appears from certified copy sentence at the foot of the said Indictment.

Sworn at, etc.

Notice of suspension.

Sir,—Take notice that, etc., (*as above*) why you shall not be suspended from practice as an Attorney and Notary of this Honourable Court for such period as to this Honourable Court shall seem reasonable

and just, by reason of your professional misconduct in that you (*here state the cause of complaint, for instance*) having on the . . . . day of . . . . received from A. . . . . of . . . . the sum of £ . . . ., on behalf of B. . . . . of . . . ., you have without sufficient reason or lawful cause failed to pay over to the said B. . . . . the said sum.

(NOTE.—If the money should already have been paid to B. . . . . but after an unreasonable lapse of time from its receipt and demand made for it, then put after the words "on behalf of B. . . . . " the following : "you have kept it for an unreasonable period, used it for your own purposes, and though you have been requested to make payment thereof to B. . . . . you have failed to do so until the . . . . day of . . . .")

And to shew cause further, etc. (*Conclude as in preceding notice.*)

(*Affidavit in support by B. or his Agent.*)

CHAPTER XLIV.

COSTS AND TAXATION OF COSTS.

ORIGIN OF COSTS.

THE rules of the Roman and of the Roman-Dutch laws as to Costs are contained in the maxims—

"*Improbus litigator et damnum et impensas litis inferre adversario suo cogatur*";

and

"*Victum in lite etiam in impensas et damna condemnandum nisi justam causam litigandi habuerit.*"[1]

These maxims are further illustrated by more modern practitioners, *e.g.*, Vroman in his *de Foro competenti*, by Middellant, 4, 2; and Merula in his *Manier van Procederen*, 4, 37, 2, n. 15, and 4, 38, 1, n. 14.

From ancient times, therefore, the rule has been that the "*losing party pays the costs of the action*," though in more modern days, as mentioned by the two last named authors, while this rule has been followed, a certain "*discretion*" has been allowed to the Court or Judge.

Formerly, by the common law of England, the "*costs followed the event*," while the practice of the Court of Chancery was that costs were in the *discretion* of the Court. But by the Judicature Act of 1875[2] it is declared that "costs of and incident to all proceedings in the High Court shall be in the *discretion of the Court*."

[1] Vinnii, 4, 16; Gaill, 1, Obs. 152, n. 1, and 151, n. 21; Christinæus, Vol. I., 19, n. 1.

[2] Order 55, Rule 1.

By this it is, of course, not meant that the Judges shall exercise arbitrary discretion, but that their discretion shall be a judicial one, governed by certain principles laid down by former Courts in their decisions, and adopted by successive Judges on account of their soundness.

The decisions given in England on "costs" are very numerous; and as they contain fuller illustrations of the practical operation of the rule of the Roman and Roman-Dutch laws than are to be found in the few reported cases in Holland, I shall follow the former, taking note of such cases on the same subject as have been decided in this Colony. It will be seen, from references hereafter given, that there is now no difference between the practice of the English, the Dutch, and our Courts as to costs, and that while the rule is that costs are "discretionary," yet in practice the ancient rule that "*the successful party is to be entitled to his costs*," is still followed, unless where the circumstances of the case are so exceptional, or the parties have conducted themselves in such a manner, as to justify a departure from it.

A resident magistrate has also such judicial discretion, and the higher Courts will only interfere when he has not exercised that discretion at all, or has proceeded on erroneous grounds.[1]

Of the principles, rules, and exceptions to rules, upon which costs are awarded, as far as they are applicable to this Colony, and more immediately concern practitioners, it is proposed to give practical illustrations by reference to standard authors and to English and Colonial decisions.

GENERAL RULES AS TO COSTS.

The most generally recognised rules are as follows:—

(1.) The party succeeding is entitled to such costs relating to the matter in which he succeeds as have been necessarily incurred; in other words, he who is in the wrong shall,

[1] *Malony* vs. *Conradie's Executor*, 6 C. T., 205. See also, *infra*, the following cases: *Meisserhamer* vs. *De Smidt*; *Korsten* vs. *Van Noorden*; *Adams* vs. *Sparks*; and *Van Heerden* vs. *Moss*, 11 C. T., 79.

unless the Court shall see some good reason to decide otherwise, bear the costs of the action.[1]

(2.) The party who has unnecessarily occasioned expense to his adversary shall re-imburse him such needless costs; for example, if a party is wrongly sued, he is entitled to his costs of opposition; also when a party by his default or delay occasions expense, he is bound to make this good to his adversary.[2]

(3.) Any party seeking indulgence shall pay to his opponent the costs incurred in consequence of the application for such indulgence; for instance, the costs of amending his summons, or of his pleadings, or of obtaining a postponement of the trial, and the costs incurred thereby and by reason of such postponement. His opponent is entitled also to his costs of opposition, though the Court may grant the indulgence applied for.[3]

(4.) The costs of a proceeding in which neither party succeeds shall not be paid by either party to the other; for instance, when the Court is equally divided, and no judgment come to, or where the jury cannot agree.[4]

(5.) And, upon the same principle, where both parties are in error as to their respective rights, and the one gains as much by the judgment as the other, then no costs are awarded, but each party must pay his own;[5] also in the case of *Lasker* vs. *Crapper*,[6] the Supreme Court held that, inasmuch as both parties had asked what they were not entitled to, each should pay his own costs; and also in the case of *Bain* vs. *Cathcart*,[7] where both parties were entirely in the wrong, each had to pay his own costs.

(6.) If the Court before which a case is heard or argued says nothing about costs, or gives the order generally "*no costs to either party*," or, after giving judgment, says, "*there will be no order as to costs*," then, of course, each party has to pay his own costs.

[1] *Re Hammersmip*, 19 L. J., 357, Ex.; *Foster* vs. *Smith*, 18 C. B., 156.

[2] *Bogg* vs. *Scott*, 19 L. J., 362, Q. B.

[3] *Dunn* vs. *Loftus*, 8 C. B., 76. See "Costs of the Day."

[4] *Wall vs. London and South Western Railway Company*, 11 Exch., 696, and *Dansay* vs. *Richardson*, 3 E. & B., 722.

[5] *Oesman* vs. *Ismael*, decided in the Supreme Court, April, 1866, not reported.

[6] Decided 11th January, 1866, not reported.

[7] Decided July, 1882, not reported.

(7.) The rule, however, that the costs of the cause go to the party ultimately successful, admits of exception where the hardship of the particular case is such that it would manifestly be unreasonable and unjust to include it within the general rule;[1] and our Supreme Court decided in 1876 in the case of *Matthews* vs. *Rosenthal*,[2] that, although the plaintiff wholly failed to prove her case, which was one for damages for unskilful medical treatment, the defendant should pay his own costs, because there was some evidence before it that he was a quack, and had imposed upon the plaintiff his pretended skill in aural surgery, which induced her to be operated on by him.

In the case of *Sadler* vs. *Evans*,[3] Lord Mansfield said that—

"every general rule must imply an exception of particular cases under such circumstances as clearly distinguish them from being within the reason and principle of the general rule."

MISCELLANEOUS REMARKS ON COSTS IN GENERAL.

In Holland several Placaaten were passed at various periods regulating the fees of advocates and attorneys according as the price of provisions and the necessaries of life increased from time to time, "*van de groote verduringe des tijds.*" Thus we find in the Placaat of 20th January, 1659,[4] the fee of an advocate for drawing the pleadings in a case increased to thirty-six stivers, equal to about 1*s.* 6*d.* of the present day; and the fee of an attorney for writing a letter of demand increased to six stivers, equal to our 3*d.*

At the present day it is, of course, different; but the fees in England for professional services have always been, and still are, more liberal than in Holland; thus we find as far back as the reign of Henry VIII., that "a fee of 6*s.* 8*d.* was paid to Mr. Spelman, S'jeant, for his counsell in makyng my answer in ye Duchy Châm"; and the same serjeant received a fee of 3*s.* 4*d.* for "his counsell in putting in of the answer."

[1] *Barker* vs. *Birch*, 1 D. & L., 816.
[2] Not reported.
[3] 4 Burr., 1987.
[4] G. P. B., Vol. 3, p. 677.

Fees of 3*s.* 4*d.* were in like manner given "for counsell" to Mr. Knightley and Mr. White; and in 1534 Mr. Yelverton was remunerated "for his counsell" with the unusually liberal honorarium of 20*s.*[1]

The question has often been asked why attorneys' fees are fixed at the odd sums of 3*s.* 4*d.*, 6*s.* 8*d.*, and 13*s.* 4*d.* This custom is derived from England, and the reason of it is, that this was the ancient Saxon mode of reckoning of *marks* (13*s.* 4*d.*), *nobles* (6*s.* 8*d.*), and *deminobles* (3*s.* 4*d.*). The sums payable for fines and official services were formerly so reckoned.

In Shakespeare's time, 3*s.* 4*d.*, or a deminoble, seems to have been the ordinary fee of an attorney. Thus, in the dialogue in "All's Well that Ends Well" between the countess and clown, we have (Act II., Scene 2)—

"Countess :—Will your answer serve fit to all questions?
"Clown :—As fit as ten groats is for the hands of an attorney."

A groat is an old English coin, first coined in the time of Edward III., of the value of 4*d.*

A guinea is a common fee among barristers. A guinea was a gold coin, so denominated because the gold, of which the first specimens were struck in the time of Charles II., was brought from the coast of Guinea. It issued at one time from the ducal mint of Bordeaux by the authority of the Plantagenet Sovereigns of Guienne, and was by the same authority made current among their English subjects; it was afterwards also struck and current in Britain. The value of the guinea varied greatly at different periods, but afterwards it was worth 21*s.* On the introduction of the sovereign, first coined in 1817, the old guinea coinage was gradually superseded; but the sum of 21*s.* British money is still called a guinea, and the fees of barristers (and nowadays also of many other professional persons) are still so reckoned.[2]

"In the 16th century," says Jeaffreson, at p. 213 of his work already quoted, "it was, and for several generations had been, customary for clients to provide food and drink for

[1] See Jeaffreson's "Book about Lawyers," Vol. I., 2nd ed., pp. 215 and 216.

[2] See Encyclopædia Britannica, articles "Guinea" and "Coinage."

their counsel." Mr. Foss gives his readers the following list of items, taken from a bill of costs, made in the reign of Edward IV. :—

"For a breakfast at Westminster spent on our counsel, £0 1s. 6d. To another time for boat-hire in and out, and a breakfast for 2 days, £0 1s. 6d."

And again, at p. 217, he says :—

"The archives of Lyme Regis show that under Elizabeth the usage was maintained of supplying counsel with delicacies for the table, and also of providing them with means of locomotion. Here are some items in an old record of disbursements made by the Corporation of Lyme Regis :—

	£	s.	d.
Paid for wine carried with us to Mr. Poulett . .	0	3	6
Wine and sugar given to Mr. Poulett . . .	0	3	4
Horse on hire, and for a sergeant to ride to Mr. Walrond, of Bovey, and for a loaf of sugar, and for conserves given there to Mr. Poffel . .	1	1	0
Wine and sugar given to Judge Anderson . . .	0	3	4
A bottle and sugar given to Mr. Gibbs (a lawyer)."			

This old custom, it is almost needless to add, is no longer in use.

An important provision in the Placaat above-mentioned is Section 53, of which the following is a translation :—

"The advocates and attorneys shall not enter into any agreement with the parties as to the remuneration (salaris) to be given to them at the termination of the suit, whether in case of success or otherwise."[1]

But by our Magistrate's Court Act,[2] it is specially provided that practitioners in that Court may, by agreement with their clients, charge them any sum over and above the fees allowed by the tariff.

A somewhat similar provision to that contained in the above section of the Placaat is in force in England under the terms "*Champerty*" and "*Maintenance.*" "Champerty" is defined as "a bargain with a plaintiff or defendant, '*campum partire*,' to divide the land or other matter sued for between them if they prevail at law, whereupon the Champertor is to carry on the party's suit at his own expense."[3] "Main-

[1] See also Voet, 2, 14, 18.
[2] No. 20 of 1856, § 38.
[3] Stephen's Blackstone, Vol. 4, p. 317, 5th edition.

tenance" is defined as "an unlawful taking in hand or upholding of quarrels or sides to the disturbance or hindrance of common right."[1] Therefore it has been decided in England that in a contract between an attorney and client the attorney shall advance money for carrying on a lawsuit to recover possession of an estate, and that the client shall, if the suit be successful, pay the attorney, over and above his legal costs and charges, a sum according to the benefit to the client, for possession of the estate, is void on the ground of Maintenance.[2]

In the case of *Box* vs. *Brandy*,[3] Lord Chief Justice Hubert said that—

"If an attorney follows a cause to be paid in gross when it is recovered, that is Champerty, but there seems to be no objection at the present day to an attorney stipulating with his client (not for a share in the spoil to be recovered, but) for a specific lump sum as his costs in lieu of a specified bill of costs or for an allowance of so much per diem."

But such an agreement does not preclude a reference of the bill to taxation, and a Master in taxing such a bill is not bound to proceed upon the basis of the agreement.[4] In the former of the two cases just mentioned Chief Justice Tindall said :—

"That as it appeared to have been a bargain made for the benefit, not of the client, but that of the attorney, I do not see how we can refuse to interfere when applied to for that purpose (that is, to have the bill taxed)."

Since then the following cases on "Champerty" have been decided:—L.R. Ch. D. for 1875–76, vol. I., p. 573, *re* Attorneys' and Solicitors' Act of 1870; also Coondoo *vs.* Mookerjee, L.R. App. Cas. for 1876–77, p. 186.

Costs should always be claimed in any summons, or notice of motion, or petition against any person.[5]

The term "*full costs*" has the same meaning as "*ordinary costs*," that is, costs of taxation between party and party.[6]

[1] See 1 "Russel on Crimes," p. 266, also Coke upon Littleton, 368 b.

[2] *Earle* vs. *Hopwood*, Law J., Vol. 30, C. P., p. 217; *Sprige* vs. *Porter*, 26 Law J., Q. B., p. 64.

[3] Hub., 117.

[4] *Tanner* vs. *Lea*, 4 Manning and Granger's Rep., 617, and *Drax* vs. *Scroup*, 1 Dowl., 69.

[5] *Smit* vs. *Gabier*, 2 C. T., 234; *McLeod* vs. *Meyers*, 5 C. T., 167.

[6] *Jamieson* vs. *Trevelian*, 10 Exch., 748.

If, therefore, you wish your opponent to pay also costs between "*attorney and client*," you should say so. So also where our Supreme Court has ordered "*all costs*" to be paid out of an estate they subsequently held this to include costs between attorney and client.[1]

The meaning of the expression "*costs to be costs in the cause*" is, that the costs incurred up to then must be paid by the party against whom the Court shall ultimately award the costs of the action.

When the judgment is "*absolution from the instance with costs*," it means that the plaintiff is non-suited, that he has failed to prove his case, and that he has to pay the costs of the action; he may, however, begin his action "*de novo*," provided he first pays the defendant's costs incurred.

The expression "*exceptions overruled or sustained with costs*" means, that the costs incurred on and in consequence of the exceptions being pleaded, must be paid by the party condemned in the costs, on the hearing of the exceptions. The practice in the Supreme Court is first to argue the exceptions before setting down the case for trial, though there is nothing to prevent an attorney (as is frequently done) from at the same time setting down the case for trial for a day subsequent to the one fixed for the argument on the exceptions; but the party doing so does it at the risk of having to pay the costs of the notice of trial, and the costs incurred in consequence thereof, if the exceptions go against him. It depends, however, upon the nature of the exceptions pleaded whether, in case they are overruled or sustained, either party must begin "*de novo*." If the exception is as to the *judicio standi* of either party, then the unsuccessful party must begin "*de novo*"; where it is not necessary to begin afresh, then the notice of trial remains good. If a party sets down a case for trial, subpœnas his witnesses, prepares for trial before the exceptions are disposed of, and the exceptions are sustained by the Court, which necessitates his beginning "*de novo*," he is liable to pay not only his own costs incurred thereby, but also the costs of his opponent incurred in consequence of the notice of trial.

[1] *Van As vs. Nel and Nel*, 8 C. T., 129.

What is the practice of Circuit is still an open question. In the case of *Campher* vs. *Raubenheimer*, heard before Mr. Justice Denyssen at the Circuit Court of Mossel Bay, in March, 1877, certain exceptions were pleaded, and the parties on both sides prepared for trial and had their witnesses in attendance. On the case being called, the exceptions were argued and sustained by the judge, whose order was, "*exceptions sustained with costs.*" This stopped the further hearing of the case, which had to be begun "*de novo,*" and nothing further was done until the bill of costs had to be taxed some time after, when the question arose whether the order as to costs meant literally only costs incurred on the exceptions, as is the practice in the Supreme Court or costs of the whole suit, considering the nature of the Circuit work? In May following a motion to the Supreme Court was made, which was virtually asking for a modification, or interpretation, of the order so as to include the costs in preparing for the trial. This was opposed, on the ground, among others, that it took the nature of an appeal, the time for which had elapsed. The point in dispute was therefore not decided; but during the discussion of the motion Mr. Justice Denyssen said that—

"as the case had not been gone into, he was not in a position to decide the question of the costs of the action,"

while the Chief Justice said that:—

"if he were sitting as the Circuit Judge and had given a similar order, he would have meant by it the costs also in preparing for trial, considering that the parties could not anticipate what the decision of the Court might be as to the exceptions, and as a precaution they were therefore obliged to be prepared for the trial so as to proceed with the case before the same Judge of the same Circuit Town, immediately after the exceptions had been disposed of."

Sometimes a defendant is liable to the payment of "*double costs.*" If, for instance, a defendant "*mala fide*" denies his signature, or without a reasonable cause avers that the signature to the document sued upon is not his, then by the Roman law he is liable to a penalty of double the amount sued for, and by the Roman-Dutch law to arbitrary punish-

ment.[1] But in the case of *Denys* vs. *Daniel*,[2] the Supreme Court subjected the defendant to a penalty of *double the costs*, and the Court has since then in all cases of "*mala fide*" denial of signature imposed a like penalty on the defendant.

By the 82nd section of the Insolvent Ordinance, debtors are liable to the payment of "*double costs*," *for the benefit of the estate*, if they do not pay their debts to the estate after reasonable notice. But it is to be observed that, while in this instance the costs are for the benefit of the estate only, in the case of "*mala fide*" denial of signature, the plaintiff's counsel and attorney pocket their double fees; and in both cases it means only double the plaintiff's costs, not those of the defendant. But if it is intended under the section of the Ordinance to ask for double costs, this should be prayed for either in the summons or in the plaintiff's declaration.[3]

In an action for divorce the Court has also discretion to order whether the offending spouse shall pay all, or only his or her own costs, and that is so whether the parties are married in or out of community of property.[4] Thus, for instance, in the case of *Truter* vs. *Truter*,[5] where the parties were married out of community of property, and had separate estates, the defendant was condemned to pay all costs. In the cases of *Le Roux* vs. *Le Roux*[6] and *De Villiers* vs. *De Villiers*,[7] where the parties were all married in community of property, the respective defendants were ordered to pay the costs. Sometimes the Court orders the costs of both parties to come out of the joint estate if the parties have been married in community of property.

An adulterer, if found guilty, is, in the discretion of the Court, liable for the costs in addition to the action for damages.[8]

In the case of *Bell* vs. *Stewart*,[9] the Court gave judgment against the defendant for £500 damages and costs for

[1] Merula, IV., 37, 2, 5; Wassenaar, I., 6, 14.

[2] M., I, 44.

[3] *Biccard's Trustee* vs. *Visagie*, 12 S. C., 413.

[4] *Re Stopforth* vs. *Stopforth*, 1 M., 273, and *Wylde* vs. *Wylde*, Ibid, 269.

[5] Decided in 1876, not reported.

[6] 1 M., 255; *Hablutzel* vs. *Hablutzel*, Ibid, 276, and *Leo* vs. *Leo*, decided February, 1876, not reported.

[7] Decided 6th June, 1878, not reported.

[8] See Chapter "*Divorce*."

[9] Decided in the Supreme Court on the 8th January, 1850, not reported.

adultery committed with the plaintiff's wife. And in a like case, that of *Hansen* vs. *Ringham*,[1] like the Supreme Court gave £100 damages and costs: and in the case of *Biccard* vs. *Fryer* the Court gave £50 damages with costs.[2]

However strange it may appear, yet it is nevertheless true that the husband who sues his wife for divorce, or when he is sued by her for a divorce, may be compelled to contribute a certain sum of money to enable her to bring, or defend, her action; and that pending the action, he has also to pay her a certain sum of money for alimentation according to her station in life;[3] but the Court may grant only a small portion of the costs, or maintenance asked for, and will be guided in this matter according to the circumstances of each case. See also B. for 1869, p. 68, *Bloem* vs. *Bloem*, where the Court granted £10 towards costs, but refused application for alimony; and in the case of *Flannagan* vs. *Flannagan*, the E. D. Court ordered the defendant to pay £60 to his wife to enable her to institute an action against him for separation *a mensa et thoro*.[4] In the case of *Eaton* vs. *Eaton*[5] the E. D. Court ordered £30 to be paid towards costs; and in *Stage* vs. *Stage*[6] £25 was ordered by the Supreme Court to be paid towards costs.

But when the wife has a separate estate of her own, exempt from the marital power, and can bring or defend the action, and maintain herself "*pendente lite*" independently of any assistance from her husband, then the Court can, in its discretion, refuse or allow her application for contribution.

If a plaintiff is not domiciled in the Colony, he can be compelled by the defendant to give security for costs before proceeding with the case,[7] unless he has sufficient immovable property not mortgaged, or, if mortgaged, of such value as would after deducting the mortgage suffice to pay the probable costs of the action.[8] A resident magistrate has also

[1] Decided December, 1881, not reported.

[2] See Chapter "*Divorce*."

[3] Hol. Con., Vol. 5, Con. 145; Wassenaar, Vol. 1, p. 22, § 48; Merula, 4, 37, 2, 16, and 4, 105, 3, note 6.

[4] B. for 1880, p. 42.

[5] 5 E. D. C., 236.

[6] 2 J., 229.

[7] *Witham* vs. *Venables*, 1 M., p. 291; *Dunlive* vs. *Harrington and Gadney*, Ibid, 292; *Ryan* vs. *Abrahams*, B. for 1873, p. 93.

[8] *Lumsden* vs. *The Kaffrarian Bank*, 3 J., 366; *Taylor and Symons* vs. *Schunke*, 1 C. T., 14; and *Ellerton Syndicate* vs. *Hutchings*, 3 C. T., 124.

the jurisdiction to require security to be given by a *peregrinus* in an action pending in his Court,[1] and this demand for security for costs should be made by the defendant and given by the plaintiff before *litis contestatio*.[2] Our Supreme Court has interpreted the term *litis contestatio* to mean the close of the pleadings,[3] and it should also be made promptly after the defendant knows the plaintiff is not domiciled here. But if a person is domiciled in the Colony, though he is an unrehabilitated insolvent, it does not entitle his opponent to demand security for costs.[4] This application for security may be made either to the plaintiff or to his attorney. But the plaintiff cannot, on the other hand, demand security for costs from the defendant as long as he is not *suspectus de fuga*, and the latter is exonerated from finding security, though he is not domiciled in the Colony.[5] Unless, indeed, the non-resident defendant makes a claim in reconvention, in which case he is obliged to give security to perform the judgment of the Court:[6] or an insolvent guardian sues, on behalf of his ward, without the leave of the Court being first obtained, in which case he must give security for costs:[7] or a person is allowed to sue *in formâ pauperis* in the Court below, in which case he must give security for the costs of appeal, if he wishes to appeal.[8] But where no execution has followed on a judgment of a Court below, and no application has been made in the Court below for security for the costs of appeal, the Appeal Court will not order such security to be given.[9] But in any case, whether domiciled in the Colony or not, either plaintiff or defendant can be arrested at the suit of the other, if either of them attempts to leave the Colony after the summons is issued, without giving satisfactory security to abide by the result of the action.[10] But such an arrest can

[1] *Gordon* vs. *Berliner*, 6 C. T., 325; Ibid, 13 S. C., 298.

[2] Merula, 4, 41, I., V. d. Linden, Jud. Prac., I., II., 4, § 4, and "Marshall on the Law of Costs," p. 447.

[3] See *Meyer* vs. *Gericke*, 1 F., 14.

[4] *Lange* vs. *Claase*, 3 C. T., 371.

[5] *Benazeck* vs. *Bisset*, 1 G. B., 310; *Kilkenny Railway Company* vs. *Fielden*, 20 L. J. Ex., 141.

[6] *Taylor and Symons* vs. *Schunke*, 1 C. T., 14, and 8 J., 103.

[7] *V. d. Walt* vs. *Hudson and Moore*, 4 J., 365.

[8] *Hilpert* vs. *Castle Mail Packets Company*, 6 J., 26.

[9] *Marais* vs. *Langford*, 1 C. T., 234.

[10] V. d. Linden's Supplement to Voet, 2, 4, 18; Vroman, I., I., 25, and notes thereon; and *Joseph* vs. *Abrahams*, decided 23rd July, 1864, not reported.

only be made by an order of Court, or of a judge, who usually first grants a rule *nisi* calling upon the party to find security.[1]

Several plaintiffs or several defendants in the same case are, unless the Court otherwise orders, jointly and severally liable for the payment of the costs in which they are condemned, but, as among themselves, the taxing officer has a right to settle in what proportion the costs are payable by each; for it may happen that one or more of the parties to the action are made plaintiffs or defendants, in order to have the record complete and all the parties before the Court, but beyond that they may have very little, or no personal, interest in the result of the action.[2] But although they are ultimately liable for the whole of the costs, where one or more of them, after excussion, fail to pay, they are in the first instance only *pro rata* liable to the successful suitor.[3]

In certain cases, however, the parties are liable to *aliquot* costs. For instance, in the case of *Brink and others* vs. *Chalmers and others*,[4] there were five respondents, and against one of them the applicants (2) were successful with costs but had to pay the costs of the other respondents. The applicants objected to the Master taxing costs against them, except such as were necessarily incurred by the other respondents, apart from the defence set up by the unsuccessful respondent, which practically, according to their contention, would amount to their paying no costs at all to the successful respondents, as the defence would in any case have been the same, and the unsuccessful respondent would have been put to the same costs. The Chief Justice, in giving judgment, said:—

"The Master should tax the costs in such a manner as that the applicants in the original motion should pay four-fifths of the costs of the respondents; and as those applicants had to be parties to the application they must pay the costs of this application. If the Court made any other order, there would always be a temptation to employ attorneys for each respondent. In the present case, all the respondents had employed one

[1] See Chapter "*Arrests*," and *Ross* vs. *Farmer*, 5 C. T., 13.

[2] *Norman* vs. *Climenson*, 4 M. & G., 243.

[3] Voet, 42, 1, 24, and *Hammon* vs. *du Toit and others*, 4 J., 360.

[4] Decided in the Supreme Court in August, 1880, not reported.

attorney, and now that the applicants were ordered to pay costs of the successful respondents, the unsuccessful respondent could not be called upon to pay all those costs. The only way was to ascertain what those costs were, and take an aliquot part, and that part would be four-fifths."[1]

There is, however, no objection to several defendants in the same action each employing his own attorney and counsel, but if they "*mala fide*" sever in their defence, or do not substantially set up separate defences, or show good reason why they severed, it is then in the discretion of the Court either to award them their costs separately in full or to allow only a portion of them.[2]

When an interlocutory order of a judge is made absolute, the costs are usually paid by the party against whom the order is made, but if an order is only *ex parte*, then the party applying for it should pay the costs.[3] But in order to claim costs from one's opponent, in interlocutory proceedings, they should be asked for in the petition, or rule *nisi*, or notice of motion, as the case may be, in approaching the Court or a judge.[4]

A person who is not on record a party to the suit cannot, as a rule, be made to pay the costs, though he may be the real party interested in the result.[5]

A surety who has not renounced the *beneficium ordinis* is not liable for the costs of an unsuccessful suit, instituted by the creditor against the principal debtor, of which no notice has been given to the surety: for if the benefit had been renounced, the creditor had the choice of suing either the principal debtor or the surety in the first instance. Notice should therefore—in all cases where there has been no renunciation of benefits—be given to the surety that he will be held liable for costs if the creditor has to proceed to an "excussion" of the debtor.[6]

The expression "*upon payment of costs*" is conditional

[1] *Hamman* vs. *du Toit and others*, 4 J., 360. For English decisions on the same point, see *Redway* vs. *Webber*, 32 L. J. C. P., 84; *Griffiths* vs. *Jones*, 2 C. M. R., 333; *Norman* vs. *Climenson*, 4 M. G., 243.

[2] *Gambell* vs. *Earl of Falmouth*, 5 Ad. & E., 403; *Bartholomew* vs. *Stephens*, 5 M. & W., 386.

[3] *Nokes* vs. *Gibbon*, 26 L. J. N. S. Eq., p. 208.

[4] *Smit* vs. *Gabier*, 2 C. T., 234; *McLeod* vs. *Meyers*, 5 C. T., 167.

[5] *Evans* vs. *Reeves*, Q. B., Vol. II., p. 334.

[6] *Hurley* vs. *Marais*, 3 J., 155.

only; for instance, when the order referring an attorney's bill to taxation provided that "*upon payment of the amount found to be due he should deliver up all deeds in his possession to his client,*" they were held to be words of condition only, so that if the client could not pay he could not have back his deeds.[1]

Making a tender in a case, or offering an apology in a libel or slander case, may weigh with the Court in mitigation of damages, but it is no cause for escaping the costs; but where the Court holds that the tender made is sufficient, it will order costs to be paid only up to date of the tender, and give the defendant his costs against the plaintiff incurred from the date of such tender.[2] In the case of *Reid* vs. *Ewan*,[3] where the tender of £25 made was considered insufficient by the Court, the Chief Justice, after reviewing the particulars of the case generally, said:—

"The only question now remaining is whether the £25 tendered was sufficient compensation under all the circumstances of the case. I think it would be well in cases of this kind if the advisers of a plaintiff paused before they recommended him not to accept a tender when it was made. There might be cases where the Court would consider the amount of the tender sufficient, and then the plaintiff would get nothing. Therefore in this case I think it was running a great risk not to accept the tender. However, the Court has now to consider what they would have awarded if the tender had not been made, and in our opinion plaintiff should have been entitled to £40. This amount being above the amount of the tender, the amount of £40 should be given with costs."

It will thus be seen what a risk is run in putting a client to the expense of a heavy bill of costs, by pressing for excessive or vindictive damages instead of accepting a reasonable tender made.

A person acting, or suing, or defending, *nomine officio*, is entitled to his costs if successful, and is liable to pay costs if unsuccessful in the action; and he may also be made to pay costs, *de bonis propriis*, out of his own private pocket, when the Court cannot exempt him from unnecessary delay, misconduct, negligence, breach-of-trust, or mal-administration,

[1] *Pugh* vs. *Kerr*, 6 M. & W., 17; *Price* vs. *Philcox*, 7 Dowl., 559; *Crowther* vs. *Crowther*, 16 C. B., 177.

[2] *Louw* vs. *Van Dyk*, decided in May, 1877, not reported.

[3] Decided in the Supreme Court in February, 1877, not reported.

or if his proceedings have been vexatious or unnecessarily litigious.

Thus the Court now invariably makes a trustee of an insolvent estate, or an executor of an estate, pay out of his own pocket the costs of a motion against him to file an account of his administration ;[1] for if he finds that he cannot administer the estate within the six months allowed by law, he should apply to the Court for an extension of time ;[2] also *Kotze* vs. *Kotze's Trustees*;[3] *Norden* vs. *Brink*.[4] In this latter case the

" Court expressed a very strong opinion that trustees and executors should be made to pay costs out of their own pockets, no matter what their reasons may be for not filing accounts within the six months, for it is the trustee's or executor's duty (*tempestive*) to apply to the Court for further time to file his accounts."

For award of costs against a trustee *de bonis propriis*, see *Benjamin* vs. *Trustees of Benjamin*,[5] and as against an executor.[6] But though the executor may be ordered to pay costs *de bonis propriis*, the attorney whom he employed and who acted *bonâ fide* is not deprived from recovering his costs from the estate.[7] But where trustees have acted *bonâ fide* in instituting or defending actions, they cannot be made to pay costs *de bonis propriis*.[8]

A guardian who enters into litigation, concerning the property of his ward, without obtaining the authority of the Court, is also personally liable for the costs if unsuccessful.[9] One of co-executors can in his personal capacity sue the other for a refund of costs the latter had charged against the estate he was not entitled to.[10] If, however, although he has not obtained the leave of the Court, the circumstances shew that the leave (if applied for) would undoubtedly have been granted, the Court will not make him personally liable.[11]

[1] *Otto* vs. *Holm*, decided 1877, not reported.
[2] § 108 of Insolvent Ordinance, and § 33 of Ord. 104.
[3] 2 M., 414.
[4] 3 Ibid, 270.
[5] Decided in 1880 in the Supreme Court, not reported.
[6] See *Quin* vs. *Pilkington and Divine*, 4 C. T., 436.
[7] Ibid.
[8] *Van Heerden* vs. *Goosen's Trustees*, 4 J. 41.
[9] *Dieleman* vs. *Benages*, 1 M., 435.
[10] *Hodgson* vs. *Du Preez*, 4 C. T., 340.
[11] *De Montmort* vs. *Board of Executors*, 6 J., 118.

But if judgment is given against a person "*nomine officio*," with costs, and costs are not recovered, the Court will not, on motion, issue execution against the person personally.[1]

The Government is also liable to the payment of costs if unsuccessful, and is entitled to get costs if successful; in fact, in this respect the Government is in no better or worse position than any private individual.[2] By the law of Holland this applied to civil as well as to criminal cases.[3] But the practice in this Colony has been for the Crown as well as the accused, in criminal cases, each to pay his own costs, whether there is a conviction or an acquittal. I have been unable to trace when this practice began, nor have I found a Colonial case to the contrary. In the case of *Carnell* vs. *the Queen*,[4] the Chief Justice said:—"This is really a criminal appeal, and in such cases it is not the practice to allow costs." But in the case of a *private* prosecution, the Court *may* adjudge the prosecutor to pay to the accused the whole or any part of his expenses occasioned by the prosecution.[5]

In an action on a Will, the costs are frequently ordered to be paid out of the estate or fund in litigation, instead of being paid by either litigant party; this is generally the case when the language of a Will is so doubtful or ambiguous as to render the acting under it impracticable, without the positive sanction of the Court; or, where there are numerous creditors, or legatees, or next-of-kin, the extent of whose interests the personal representatives are unable to ascertain; or, where the persons immediately interested are under disability; or, where there are suspicious circumstances under which the Will was executed; or, where the testator has made a mistake, and the parties succeed in setting aside the Will. In the case of *Bartlett* vs. *Wood*,[6] the Lord Chancellor said that—

"No costs ought to be given out of an estate except for those proceedings only that were in their origin directed with some show of reason and a proper foundation for the benefit of the estate, or which had in their result conduced to that benefit."

[1] *Wehmyer* vs. *Swemmer*, *Trustee estate Heynes*, B. for 1874, p. 46.
[2] *Re Est. Buissinné*, 1 M., 318.
[3] Gaill, Obs., I., 152, I.
[4] 1 J., 43.
[5] § 19, Ord. 40 of 1828.
[6] 30 Law J. Ch., 6, 16.

Therefore, where an heir or legatee unsuccessfully contests the validity of a Will, he should pay the costs of the action;[1] so also, where there has been unusual delay.[2] In the case of the *Executors of Schönnberg* vs. *the Executors of de Vos*,[3] on a bond dated in 1848, no proof being tendered of payment, the Court gave judgment for plaintiffs; but owing to the lapse of time, and to other circumstances rendering the matter doubtful, they held that de Vos's executors were bound to come into Court and defend. They ordered the costs, however, to come out of de Vos's estate.

A petitioner, who fails to obtain the leave of the Court to sue, or defend, *in formâ pauperis*, either because he is found not to be a pauper or because he has no case upon the merits, must pay costs of opposition.[4] In a case where certain persons were condemned in costs, none of them nor anyone else could, in respect of issues similar to those raised in the former action, sue the defendant *in formâ pauperis*.[5] Nor could a person who sued *in formâ pauperis* appeal without giving security for the costs of appeal, nor appeal *in formâ pauperis* while costs he was condemned to pay were still unpaid.[6]

A person summoning or defending "*in formâ pauperis*" is not liable to pay costs if he is non-suited or fails in the action. On the other hand, he is entitled to his costs if successful.[7]

The costs a party is condemned to pay in a *pro Deo* case begin, not from the issuing of the summons, but from the petition for leave to sue, or defend, *in formâ pauperis*, and include all the costs incurred until that order is obtained; for they are treated as costs in the cause. So also the costs incurred in obtaining the consent of the Court to sue, or defend, in cases where such a preliminary application to the Court is necessary, are treated as costs in the cause, as, for instance, in the case of a minor who has no guardian.[8]

[1] *Le Sueur* vs. *Le Sueur's Est.*, B. for 1876, p. 153.
[2] *De Jager* vs. *Scheepers*, B. for 1875, p. 86.
[3] 1 J., 325.
[4] *Goliath* vs. *Keating*, 7 J., 52.
[5] *David* vs. *Rajiet*, Ibid, 81.
[6] *Goldman* vs. *Glass*, 5 J., 76, and *Hilpert* vs. *Castle Mail Packets Company*, 6 J., 26.
[7] *Mathews* vs. *Hart*, decided in 1874, not reported.
[8] *Lipscombe* vs. *Turner*, 4 D. & L., 125, and *Curator of Camphor* vs. *Marnitz*, 6 J., 95.

A suitor who dispenses with professional assistance, and conducts his own cause, is entitled only to his costs actually out of pocket, and not to any remuneration for his own services; to this rule, however, there is an exception in favour of an attorney acting on his own behalf;[1] but the attorney so acting in his own behalf cannot make the usual charges for taking instructions, as he is not entitled to charge as for instructing himself.[2]

A plaintiff in a successful action to compel transfer to be effected to him, himself tendering the purchase amount, is entitled to deduct his costs from the purchase amount.[3]

A client can refuse to pay, unless a proper bill is rendered, and the bill should contain sufficient information as to the work done, to enable him to tax it or to take advice on it, and the items must be set forth in detail and not lumped together in one sum[4]; but he cannot refuse to pay the bill because the work was done on a Sunday.[5]

The Court can, in its discretion, order a bill of costs to be taxed, even after its payment, but will not lightly interfere unless the special circumstances of the case appear to require it; and the application must be made within a reasonable time and set forth the objection to specific items.[6] The payment of a bill of costs is a tacit acknowledgment of its correctness. Therefore the special circumstances which the aggrieved client complains of must depend upon the nature of each case, and the applicant must satisfy the Court that he has good cause of complaint,[7] which must be either such as existed at the time of payment or such as appears from the bill itself, as, for instance, when the applicant has been absent in a foreign country, or the attorney withholds vouchers, or the bill is incomplete, or the facts relied on in some way really prevented the applicant coming earlier, or in case of fraud or extortion.[8]

[1] *Jervis* vs. *Dewes*, 4 Dowl., 764; *Parsloe* vs. *Foy*, 2 Dowl., 181; *Leaner* vs. *Whalley*, 2 Dowl., 80.

[2] See *Findlay* vs. *Farquharson*, 3 C. B.. 347.

[3] *Van Wyk* vs. *Van Wyk*, B. for 1873, p. 82.

[4] *Cook* vs. *Gillard*, 1 E. & B., 33.

[5] *Peate* vs. *Dickens*, 1 C. M. & R., 422.

[6] *Re Whicher*, 16 M. & W., 549.

[7] *Re Gedge*, 14 Bean, 64.

[8] *Maunder*, 6 Q. B. Rep., 871, 13 L. J. Q. B., 28; *re Shackell*, 23; *re Dearden*, 14 L. J. Ex.

You can sue your client for provisional sentence on a bill of costs due by him to you; but the bill must be first taxed by the taxing officer after due notice.[1]

When the Court refuses provisional sentence in a case, with costs, the plaintiff, if he wishes to go into the principal case, must first pay the defendant his costs of opposing provisional sentence; nor can the defendant proceed with the principal case when provisional sentence has been granted against him, with costs, until he shall have paid the plaintiffs costs in the provisional case; also when the plaintiff withdraws a provisional summons, he may be compelled before proceeding "*de novo*" to pay the costs incurred on the former summons; and this payment should also be made before any "*fresh proceedings are initiated.*"[2] In the case of *Marincowitz* vs. *Matthys*,[3] the Supreme Court held that the latter case is not quite correctly reported in Menzies. There was a special order as to costs which the report does not say. Thus, as now decided, where there is a special order as to costs, no fresh proceedings can be taken without first paying those costs. So also did the Court decide in the case of *Thacker* vs. *Fourie*.[4] So also where a person brings two actions, and is unsuccessful in the first, he must pay the costs of the first action before proceeding further with the second.[5]

Where the parties reside in different districts, it does not matter how small the amount sued for may be, the judgment carries the costs of that Court. Thus in a case where a person living at Colesberg sued another, who lived in Cape Town, in the Supreme Court on a "good-for" for £5 3*s.* 7*d.*, Supreme Court costs were given.[6]

The defendant who has to go into the principal case, to upset the provisional sentence against him, is entitled to demand from the plaintiff security "*de restituendo*" before he pays the capital, interest and costs, in order to be secure in getting back his money should he be successful in the action.

[1] *De Wet* vs. *Meyer*, 1 M., 59, and *Dickson* vs. *Gildress*, Ibid, 60.

[2] *Denys* vs. *Stofberg*, 1 M., 301; *Simpson & Co.* vs. *Fleck*, 2 M., 225.

[3] 5 C. T., 299.

[4] 7 C. T., 132, and 14 S. C., 123.

[5] *Cape Central Railways* vs. *Walker*, 1 C. T., 73.

[6] *Sluiter and Nesor* vs. *Medcalf*, 8 J., 211.

In the case of the *Trustees of Van Niekerk* vs. *Tiran*,[1] a summons for civil imprisonment, founded upon a judgment of the Supreme Court, was dismissed on the ground of short service. A fresh summons was issued, and on the return day defendant opposed, on the ground that his costs on the former application, which were less than the judgment debt due by him, had not been paid. The Court refused to entertain the objection, and granted a decree of civil imprisonment. If the plaintiff were compelled to pay costs to a man from whom he is seeking to recover the amount of a judgment debt, and were not allowed to set off such costs in reduction of his claim, it would be contrary to both justice and the common law on compensation.[2]

If the costs of the action are not asked for on the day judgment is given, and a motion be afterwards made to the Court for costs, the costs of such application cannot be charged against the person who has to pay the costs of the action.[3] A notary is entitled to his reasonable travelling expenses and costs of protests for presenting a note at the place where it is made payable, if there is no cheaper means of protesting the note; but he cannot claim these expenses from the debtor, if the note is not presented on the day it becomes due, or if the debtor duly pay it on presentment.[4]

The local attorney is always liable to the principal attorney for his costs, the latter as a rule debiting the local attorney, who immediately employs himself and not the client, for whose benefit the work is done; for the attorney who employs another is presumed tacitly to guarantee the payment of his expenses, as he is in a position to get his client to secure him as to the costs; and if he does not wish to be responsible for the costs, he should inform the principal attorney, who will then, by taking up or continuing the work, accept the risk himself.[5]

Where no attorney is available and an agent has to be employed, the Court may direct the taxing officer to allow a fair remuneration to the agent; but this application for

[1] Decided December, 1881, not reported.
[2] Gaill, I., 151, n. 23 and 24.
[3] *Orlandium* vs. *Pope*, 2 M., 260.
[4] *Beukes* vs. *Van Wyk*, 2 M., 282; and Rule of Court, 304.
[5] *Serace* vs. *Whittington*, 2 B. & C., 11.

remuneration should be made at the time judgment is given, otherwise the applicant will have to pay the costs of a later special application.[1]

By law a judgment gives no preference, and therefore an attorney's costs are not preferent; our law formerly recognised the "*pignus judiciale*," a judicial hypothec which was obtained over the property attached by seizure in execution but not by the judgment.[2] This principle was also recognised by Ord. No. 64, sec. 29. But by the 22nd sec. of the Insolvent Ordinance,[3] the law is altered, and now an attorney is preferent only for *costs in execution* and *sequestration costs*, that is, *costs incurred from the time of the issue of the writ, and costs to place the estate under sequestration.* The attorney has therefore only a concurrent claim for costs of the action. Of course, if after the sequestration of an estate actions are instituted by or against it, and costs have to come out of the estate, then the attorney's costs on such actions are preferent to other claims.

Where the residue of an insolvent estate is insufficient to pay the costs of administration, the creditors who have proved on the estate are *pro rata* liable to contribute the deficiency of such costs.[4]

An attorney's claim for costs becomes prescribed at the end of three years, after which time prescription can be pleaded if such costs are sought to be recovered by an action at law.[5] But the time of prescription does not begin to run against the attorney till the completion of the business; for his claim to remuneration accrues only on the completion of the work, though, pending the suit, he can refuse to proceed with it unless he is furnished with the necessary funds.[6] In this latter case Baron Pollock said :—

"The simple point is whether the plaintiff's claim is barred by the statute of limitations, the suit in which he was retained not having been terminated, and no notice having been given by him that he would not proceed with it. Mr. Phipson has relied on what fell from the late Lord Abinger

[1] *S. A. Association* vs. *Van Staden*, 9 J., 271.
[2] Voet, 20, 2, 32, & 3, Burge, 329.
[3] Ord. No. 6 of 1843.
[4] *Steyn's Trustee* vs. *Gous*, 4 C. T., 356.
[5] § 5 of Act No. 6 of 1861.
[6] *Harris* vs. *Osborne*, 2 C. & M., 629; *Whitehead* vs. *Lord*, 7 Exch., 691.

and my brother Parke in the case of *Nicholls* vs. *Wilson*, namely, that there may be circumstances which would dispense with such a notice. But I do not think that the present case forms any exception whatever to the general rule, that, as long as the suit is going, so long is the attorney bound to attend to it; and he cannot sue for his costs during such period, unless some communication takes place between him and his client, by which the retainer is so far put an end to as to give him a right of action. It could not be left to the jury to say whether the case had not been brought to such a difficult and perplexing pass as to afford no reasonable prospect of arriving at a termination, and therefore to be considered, for all practical purposes, as brought to a conclusion. Here the plaintiff's cause of action did not arise before the death of the client, and therefore the debt was not barred by the statute."

The question of charging interest on costs has never been seriously entertained by the profession, and has certainly never been judicially decided in this Colony, but there is no doubt whatever that an attorney is entitled to charge interest on his costs from the date of taxation, unless he can show a specific agreement or judgment to charge interest from an earlier date;[1] but it is beyond the taxing officer's power to tax interest.

A person cannot charge for his fees and costs incurred in a case as well as a commission for collecting.[2]

COSTS OF THE DAY.

The term "Costs of the Day" may be described as such unnecessary or *extra costs* as have been, or may be, incurred, owing to a party to a suit applying for, or causing, the postponement or delay of the trial, *which costs would not have been incurred but for such delay.* The costs, then, which would necessarily and in any case have to be incurred in order to be ready for the trial when the case is called, are not, except in some instances as to witnesses' expenses, included in costs of the day, but are costs in the cause; such, for instance, as for preparing the brief, and for the counsel's fee thereon. No hardship is suffered by the party causing the delay paying only such extra costs as have been or may be

[1] Van der Linden, his Laws of Holland, 3, 9, 17; and his Jud. Prak., 4, 3; for English decisions to the same effect, *Schroder* vs. *Clough*, 46 L. J. C. P., 365; 35 L. T., 850.

[2] *Marks* vs. *Esterhuysen*, 3 J., 38.

incurred in consequence of his delay, while, on the other hand, the other party would in any case have had to incur certain costs to be ready for the first day's proceedings.

As an instance of the doubt which has formerly arisen as to the meaning of the term "costs of the day," the parties in the case of *Pocock's Trustees* vs. *Harris's Executors*,[1] *agreed with the consent of the Court*, that a round sum of £5 5*s.* should be taken as costs of the day. But the practical meaning of the term is no longer in doubt, and can be better illustrated by giving examples, *pro* and *con*, on some of the more important points which most frequently occur in our practice.

For instance, when the plaintiff has given notice of trial and afterwards countermands it, he must pay not only his own costs but also all costs incurred by the defendant in preparing for the trial by reason of the notice, which costs, but for the notice and countermand, the defendant would not have been put to;[2] and this is so whether the trial be countermanded from one day to another during the same term, or to a subsequent term, or without any date fixed.

So also is the plaintiff liable to pay to the defendant not only the costs of the day, but also the costs of the suit, if after entering the cause for trial, he withdraws it altogether and abandons the action.[3] In the case of *Swain* vs. *Colonial Government*[4] the Court decided similarly, and added that the plaintiff should pay the costs of the defendant properly incurred before the receipt of the notice of withdrawal of trial, *including witnesses' expenses*. Or, where the plaintiff is in default on the day of trial and does not prosecute his case when called on the roll, the defendant is entitled to *comparuit costs* and prays for *comparuit*, that is, a declaration that he appeared on the day of trial, and was prepared to answer the plaintiff's claim, but that the latter was in default. The benefit of this to the defendant is absolution from the instance with costs of suit.[5] Though this is still law, the Supreme Court has of late years, in order to hear what the

[1] B. for 1869, II., 153.
[2] 32nd Rule of Court.
[3] *Walker* vs. *Lane*, 3 Dowl., 504.
[4] Decided December, 1890, not reported.
[5] Van der Linden Laws of Holland, 3, 9, 13, and the references there given; also his Judicieel Praktyk, I., II., III., 9.

plaintiff has to say, granted instead a rule *nisi*, calling on him to show cause why he should not be ordered to pay the costs of the action.[1]

On the other hand, the defendant is liable to pay to the plaintiff the costs of the day if, after due notice given, he, or his attorney, is the cause of the trial being delayed; so also if the defendant applies, on or before the day appointed for the trial, to put it off on the ground of illness of a material witness for the defence, or for some other satisfactory reason, the Court will allow the postponement on the defendant paying to the plaintiff the expenses incurred in giving notice of trial, in subpœnaing the witnesses and countermanding the notice of trial and, in short, all extra expenses caused in consequence of the delay.[2] But if after the cause is called, the plaintiff should apply to the Court for a postponement on account of the absence or illness of a material witness, or for any other satisfactory reason, he is liable for the defendant's costs in the same manner as the defendant is to him.[3]

The party, however, who sets down the case can at any time, before it is called, countermand his notice of trial without an application to the Court; but the party who has received notice of trial, and wishes for a postponement, unless he can agree with his opponent to put off the trial to some other time, must apply to the Court and shew good cause for his application.

The costs incurred in subpœnaing witnesses afresh, and the necessary refreshers to counsel in consequence of a postponement of a case, are costs of the day. If the case is postponed by the action of either party from one day to another, then the witnesses' expenses incurred in consequence of the postponement are included in the costs of the day. If the postponement is to such a period as necessitates the witnesses returning home, then all the expenses of the witnesses for coming to and staying at the Court and returning home are included in the costs of the day. When the postponement is only for a few days and the witnesses

[1] *Pace* vs. *Pace*, 7 C. T., 475.

[2] *Attorney-General* vs. *Hall*, 2 Dowl., 3; and *Walker* vs. *Lane*, 3 Dowl., 504.

[3] *Rex* vs. *The Mayor of Yarmouth*, 5 B. and Ald., 531.

have to remain for the trial, then the expenses of their detention from the date of the postponement to the date of re-hearing are included in the costs of the day.

When both parties are in default on the day of trial, or when they agree to withdraw the case from the roll, or to postpone it, then the costs of the day are costs in the cause.[1] In the case of *Morgan* vs. *Fernyhough*,[2] Baron Pollock said :—

"The question in this case is whether the defendant is entitled to the costs of the day for not proceeding to trial, where neither the plaintiff nor he attended in pursuance of the notice of trial, in consequence of which the case was struck out. We are of opinion that under such circumstances the defendant is not entitled to such costs. Our judgment is founded upon this short ground, that it was entirely owing to the defendant's own fault that useless costs were incurred, for if he had duly attended at the trial he might have nonsuited the plaintiff. But as he was not in attendance, both parties are *in pari delicto;* and the person who is equally at fault with the other side asks the Court for costs, which are the consequence of the neglect in which he concurred, and which was the cause of the mischief whereof he complains. . . . It is not necessary to make any further reference to the cases ; for if the defendant had been present at the trial, the costs he now seeks to recover would not have been thrown away."

When a case on the roll remains untried without the fault of either party, but by reason of the pressure of business, or by the direction of the Court, then the costs incurred in consequence thereof are also costs in the cause, because the delay arises from the act of the Court. In the case of *Gibbon* vs. *Philips*,[3] Lord Tenterden said :—

"The general rule is that a party who succeeds *ultimately* is entitled to his costs occasioned by the cause having been made a *remanet*. Here the plaintiff has ultimately succeeded ; therefore the costs of the *remanet* ought to be considered as costs in the cause."

Whichever party has to pay the costs of the day can be compelled to pay these costs before he proceeds further with his case, unless his opponent makes no objection ; but it is in the discretion of the Court, upon application by either party, whether or not they will stay the trial of the cause until the first costs are paid.[4]

Whenever the plaintiff is in default and has been barred

[1] *Blow* vs. *Wyatt*, 4 M. & W., 407.
[2] 11 Exch., 205.
[3] 8 B. & C., p. 437.
[4] *Waller* vs. *Joy*, 16 M. & W., 60.

from pleading, &c.,[1] he must pay the costs of defendant's appearance, but the default of the defendant does not necessarily make him thereby answerable for the costs of the plaintiff, who has still to prove his case.

MODEL BILL OF COSTS OF THE DAY.

Plaintiff's costs of the day, where the case is postponed from *one day to the next*, on application of the defendant, without previous notice given of the application.

	£	s.	d.
Attending in Court when plaintiff (or defendant) applied for a postponement of the case owing to (state cause, as for instance) the absence of a material witness, and instructing counsel to oppose, or if application be granted, then to apply for costs of the day	0	3	4
Brief to senior counsel	0	5	0
Paid his fee (as on motions).			
Attending thereon	0	3	4
Brief to junior counsel	0	5	0
Paid his fee (as on motions).			
Attending thereon	0	3	4
(For the reason of instructing and feeing the two counsel engaged in the case, see the principles on noting judgment in the cases of *Edmeades* vs. *Mostert*, and *Edmeades* vs. *Scheepers*, and *Heydenrych* vs. *Kingon* (pp. 861–863 and 863–865).			
Attending Court when postponement was granted to next day, plaintiff (or defendant) to pay costs of the day . . .	0	13	4
Attending thereafter for order of Court and to pay charges .	0	3	4
Paid for same and stamps.			
Copy order for service and service thereof (as on motions) .			
Letter to local attorney informing him of the postponement and the cause thereof	0	5	0
Paid Mr. —— his witness allowance for the day (see Tariff for Witnesses).			
Attending thereon and taking his receipt	0	3	4
(So also if there are other witnesses)			
Bill of costs, &c. (Conclude as on motions).			

Where *notice and affidavits* have been served on which the application was founded, then, of course, the plaintiff is entitled to the usual charges thereon and for replies thereto, *in addition to the above* bill.

If the case is postponed for a further period than the next

[1] 25th Rule of Court.

day, or from one week to another, *in the same term*, then the costs of the day in addition to the above are the additional expenses and allowances of the witnesses during their detention till the day fixed for hearing the case.

If the case stands postponed at such a long interval in the term as to make it less expensive for the witnesses to go home than to be detained in town, then in the costs of the day are included their allowances and travelling expenses from the Court house and back again to the Court.

If the case stands postponed *sine die*, or to the next term without fixing a date, then in the costs of the day would be included the expenses for fresh subpœnas and the usual costs thereon.

But where a case stands postponed by order of the Court to a definite day, either in the same term or in a subsequent term, then no fresh subpœnas are necessary.[1]

In any case where term refreshers to counsel become necessary, or is customary, owing to the postponement, these also, with the usual charges thereon, form part of the costs of the day.[2]

EXPENSES OF WITNESSES.

In the Chapter on "*Subpœnas*" I fully discussed, *inter alia*, the privileges and liabilities of witnesses, and who can, or who cannot, be compelled to give evidence. Here I shall confine myself to the subject of *allowances* to witnesses, and who are, or who are not, entitled to their expenses.[3]

It is but just and reasonable that a person who has to give up his time to attend a trial and give evidence, frequently at great inconvenience and loss, should receive some remuneration for his attendance and be re-imbursed the expenses he has been put to as a witness. Of course, many a witness, especially a professional man with an extensive practice, cannot leave his business for a single day except at a great sacrifice. Still, if such a person were to be remunerated for the actual loss he suffers by his absence from his own

[1] See Chapter "*Subpœnas*."

[2] See *Edmeades* vs. *Mostert*, next Chapter, pp. 861–863.

[3] See also next Chapter, under IV. Order of Court as to Allowances and Expenses to Witnesses.

business, it might be very burdensome to a suitor who could not dispense with his evidence, to have him in attendance at the trial; and many a suitor would, in consequence, have to lose the testimony of such a witness. On the other hand, a suitor cannot expect that a man shall give up his time for his (the suitor's) benefit without some remuneration. The Legislature has therefore intervened between the parties, and said that a witness who duly attends the trial shall be entitled to a fair and reasonable allowance for travelling expenses and for loss of time. But in the case of *Heynes, Mathew & Co.* vs. *The Town Council*,[1] the Supreme Court held, on review of the taxations of the bill of costs, that any agreement to pay a witness for his attendance, more than what is allowed by the tariff, is contrary to public policy and cannot be enforced; and so also did they hold in the case of *Knox* vs. *Koch*.[2]

The allowance to a witness varies according to his profession, trade, or occupation, and it is to be conformable to his position in life, or state of health. He is entitled to his expenses from the time it is necessary for him to leave his home till his return, within a reasonable time after the trial is over.

The small remuneration which a person is entitled to claim for his expenses as a witness in a criminal case is upon the principle (though I think it a false one) that a witness in giving his evidence in a criminal case is presumed to be serving his King, and doing good to society and his country by having crime punished. Instances have been known of persons who have secretly withheld their testimony in criminal cases in which they were not directly interested, for the simple reason that the trifling remuneration of 4*s.* 6*d.* in all, per day, would not have paid the fees of the tolls they had to pass in one day, and the forage for a horse. If such persons were better paid, or remunerated, they would not, perhaps, virtually connive at crime by which they are not the sufferers. But the discussion is not now of witnesses in criminal cases, and must therefore be confined to civil cases.

[1] Decided in 1883, not reported; see pp. 796 and 846.

[2] 2 J., 382. See also witnesses' expenses, next Chapter, under IV. Order of Court.

A witness who has been duly subpœnaed, and who is not present at the trial and ready to give his evidence when called upon, is not, as a rule, entitled to any expenses.[1] If, however, he has made every effort since receiving the subpœna to attend at the trial, but has been prevented by an unforeseen cause, he will be entitled to his expenses incurred as a witness, in his endeavour to attend. But he must produce satisfactory proof that he made arrangements to attend, and that his failure was not caused by his own negligence or want of prudence. His expenses in such a case do not, however, form a part of the costs between party and party, but are costs between attorney and client.

Up to 1861 a party to a suit could not give evidence in his case, but by the 8th section of Act No. 4 of that year, he became competent and compellable to do so, and if successful at the trial, he will be entitled to claim from his opponent his expenses as a witness, if the Court should be of opinion that he was a necessary witness on his own behalf. But he should apply for his expenses immediately upon judgment being given; for if a formal notice of motion to the Court should afterwards be necessary to ask for them, he will not be allowed the costs of such notice as against his opponent, but will have to pay them himself;[2] and if he is not successful in his application, it is in the discretion of the Court to order him to pay the costs of his opponent for opposing the motion.

So also for any special costs, such as qualifying to be a witness, application should be made on judgment being given, while the matter is fresh in the memory of the Court.[3] This rule applies also to a country agent, who is not an attorney, to be allowed a fair remuneration for his work as agent.[4]

Though a necessary witness in the case, the Court has refused a suitor her expenses as a witness, on the ground that her guardian acted imprudently in not accepting a tender of £250 from the defendant for his breach of promise, which tender was considered sufficient under the circumstances; but

[1] *Fryer* vs. *Sturt*, 24 L. J., 154 C. P.

[2] *Van Wyk* vs. *Van Wyk*, B. for 1868, p. 252.

[3] *Wynberg Municipality* vs. *Clayton*, 3 C. T., 200; *Logan* vs. *The Colonial Government*, Ibid, 225.

[4] *South African Association* vs. *Van Staden*, 9 J., 271.

in order that she should not be made to suffer for her guardian's acts, the Court gave her £300 damages, so as to carry costs, but refused to allow her expenses as a witness.[1]

In the case of the *Trustees of De Marillac* vs. *Henry de Marillac*,[2] where absolution from the instance was granted after hearing only the evidence of one of the plaintiffs, the Supreme Court allowed the defendant his expenses as a witness, on the ground that by the judgment given he had no opportunity to be adduced as a witness on his own behalf, and also that his counsel had certified in the advice on evidence, that he was a material witness.

If a party to a suit is adduced as a witness by his opponent, he is entitled to his expenses like any other witness.[3]

The object of a subpœna is to secure the attendance of a witness; but if a witness, though not subpœnaed, gives material evidence, he is entitled to his expenses for his attendance[4] especially if the taxing officer is satisfied that the witness had been requested to come to the Court, and that he came *bonâ fide* from the country for the purpose of giving his evidence.[5] But if not subpœnaed and not examined, he is not entitled to costs as between party and party.[6] It is advisable, therefore, in order to avoid disputes on taxation, each witness intended to be called at the trial should be subpœnaed. Of course, if you subpœna a witness, whose evidence is not material to any issue in the cause, you cannot claim his expenses from your opponent, but your client will have to pay his expenses.[7]

A successful suitor is entitled to claim from his opponent the expenses of his witnesses, who have been duly subpœnaed and were present at the trial and prepared to give evidence, though they were not called; as, for example, where absolution from the instance has been granted, because the plaintiff has failed to make out his case; or where it has been necessary for either party to be well fortified by evidence in

[1] *Van der Hoeven* vs. *Robertson*, decided May, 1877, not reported.
[2] Decided May, 1877, not reported.
[3] Act 4 of 1861, § 9.
[4] *Stenhouse* vs. *Barnes*, Cas. Pr. C. B., 98.
[5] *Steenkamp and others* vs. *De Villiers and others*, 3 C. T., 104.
[6] Rule of Court, 315, par. 14.
[7] *Jones* vs. *Tobin*, 4 Bing. N. C., 123.

consequence of a serious allegation against him by the other; or when, owing to the conduct and proceedings of his opponent, the other party has had to have every information upon the case before the Court, though from what transpired at the trial it became unnecessary to examine such witnesses. The expenses of such witnesses will, however, only be taxed as between party and party, when it can be proved that their evidence, if they had been called, would have been material, and that a reasonable necessity existed for their attendance; and in order to decide as to whether, or not, the evidence would have been necessary, the taxing officer may refer to the brief on which their statements were minuted, and may refer also, by way of assistance, to the counsel's advice on evidence, though he is not bound by it.[1]

But if more witnesses are subpœnaed than are reasonably necessary, the costs of these will not be allowed as between party and party,[2] in which the Chief Justice said that—

"The main item objected to was with regard to the witness expenses. That was a *question which must be regulated* by the 315th Rule of Court, which provides that in the taxation of costs between party and party nothing should be allowed for witnesses unless it is proved that their evidence was absolutely necessary. This Rule clearly throws on the party who demands payment the onus of proving that their evidence was material to the case; and in this case it seems to me that plaintiff has failed to prove this. Seventeen witnesses were actually examined, and in addition to these it is prayed that the expenses of twelve others should be allowed."

A witness subpœnaed by both parties is entitled to claim his expenses from either side if he chooses, or partly from the one and partly from the other side, but in either case he can only claim the amount that he would have been entitled to, if he had been subpœnaed by one side only; similarly, if he has been in attendance on more cases than one, he is entitled

[1] *Louw* vs. *Hofmeyr*, B. for 1869, p. 290; *Rabie* vs. *Naudé*, and *Keyter* vs. *McLachlan*, B. for 1875, pp. 3 and 6; also *Hugo* vs. *Fick*, not reported, decided in the Supreme Court, August, 1876, and *Shiels and Van Rooyen* vs. *Wehmeyr*, decided 15th May, 1877, not reported, see p. 797; *Miller* vs. *Thompson*, 4 M. & G., 260; *Bagnall* vs. *Underwood*, 11 Price, 510; *Epson* vs. *Fairfax*, 8 A. & G., 296; and since then the Rule of Court, 315, § 14.

[2] *Meintjes* vs. *des Vages*, 2 J., 11; and *Berger* vs. *Equitable Assurance Company*, decided 9th August, 1883, not reported.

to no more than a proportionate part of his expenses in each case only.[1]

If a witness is in custody and has to be brought up in the charge of a police officer, he is entitled to the usual allowance of a witness, and the police officer's travelling expenses and subsistence money are also to be paid by the party who is condemned in the costs.

A witness whose evidence is inadmissible, or which has been rejected by the Court, cannot be allowed his expenses as between party and party.[2] The attorney should therefore be cautious, and not put his client to the expense of producing an inadmissible witness, or one who cannot in some way or other contribute, or confirm, material evidence upon any one issue.

Formerly, by the law of England, the costs of experiments to qualify a witness were not allowed between party and party; also the expenses of experts who might be employed, and the costs for their labour in making experiments or an examination could not be charged as between party and party. The rule was that the costs of all evidence which naturally existed would be allowed, but the expenses of artificial discovery by experiments, resorted to from the anxiety of the parties to throw extra light upon the case, would not be allowed as between party and party.[3] But since this judgment was given the English Judicature Act of 1875 has been passed, and by it the "*just and reasonable charges and expenses properly incurred in procuring evidence*" are allowed as between party and party.[4] So, too, in this Colony since the date of the passing of the said Judicature Act, and by virtue of the general discretion of the Court as to costs, the Supreme Court has allowed, as between party and party, the special costs and charges necessarily and properly incurred by a witness in his experiments, or investigations, or otherwise, if under the special circumstances of such case the

[1] *Griffin* vs. *Hoskins*, 1 H. & M., 95; *Benson* vs. *Schreider*, 7 Taunt., 337; and since then Rule of Court 315, § 17.

[2] *Galloway* vs. *Keyworth*, 15 C. B., 228; *McLachlan* vs. *Impey*.

[3] *Omerod* vs. *Thompson*, 16 M. & W., 860.

[4] See also *Mackley* vs. *Chillingworth*, 2 C., P. D., 273, and *Turnbull and others* vs. *Janson*, 3 C. P. D., 264, and 47 L. J., C. P., 384.

Court should think it reasonable and just to qualify as a witness, and if the Court has been assisted thereby. But such costs should be applied for to the Court on judgment being given, while the matter is fresh in the recollection of the Court; and such costs should not be taxed without a special order of the Court.[1]

So also in the case of *O'Shea* vs. *The Town Council of Port Elizabeth*,[2] the Chief Justice said:—

"There is no doubt the Court has on some occasions allowed qualifying costs, but they have only been allowed in very special cases, where the Court has derived considerable assistance from the production of plans, &c., and of course where it has been necessary to qualify for the purpose of making these plans."

The expenses of a surveyor in and about a survey, and in the preparation of plans *which are necessary, for the purposes of the case, in order to bring it in a proper form before the Court*, and which are used at the trial, are allowed as between party and party.[3]

In the case of *Heynes, Matthew & Co.* vs. *The Cape Town Council*,[4] the Chief Justice said:—

"It is impossible to lay down any general rule in a matter of this kind. The facts of each case must guide the Court as to whether any *elaborate plans* were required or not. I can well imagine *cases in which it would be necessary, for the purposes of arriving at a satisfactory decision, to have clearly detailed plans* of the drainage of Cape Town. The question is, whether this is one of those cases. I am satisfied that this is a case in which those elaborate plans and drawings were not required. The decision of the Court goes on the ground that whatever the nature of the drains may be, it is necessary for the Town Council to have them cleaned periodically, and that, having failed to clean them, damage was occasioned to the plaintiffs which they are entitled to recover. If there had not been a single plan before the Court, the decision would have been the same; for the oral evidence would have been quite sufficient to enable the Court to arrive at a conclusion. The taxing officer has allowed expenses for examining the drainage, and for preparing one plan and making other preliminary enquiries. It is just possible that a few guineas more might have been allowed, but there is nothing to justify the Court in reversing the decision of the taxing officer. If Heynes, Matthew and Co. want those elaborate drawings, they will pay additionally for them; but I do not think that amount ought to be paid by the Town Council."

[1] *Wynberg Municipality* vs. *Clayton*, 3 C. T., 200, and *Logan* vs. *Colonial Government*, Ibid, 225.

[2] 5 C. T., 173.

[3] *De Villiers* vs. *The Cape Divisional Council*, B. for 1875, p. 122.

[4] Decided 28th May, 1883, not reported.

The expenses of searching for a witness, or seeking information as to his whereabouts, will not be allowed as costs between party and party.[1]

An advocate, or an attorney, in a case in which he is engaged, is also entitled to his expenses as a witness in addition to his fees or costs in the case, and being a professional man, he is, like every other professional witness, entitled to his expenses as such, though he is not called upon to give professional evidence.[2]

In the case of *Shields & Van Rooyen* vs. *Wehmeyer*, above mentioned, on a review of a Circuit Court bill of costs, in which the plaintiff's attorney claimed and was allowed his expenses as a witness, the Chief Justice said that—

"attorneys were never allowed both fees and travelling expenses, as the two things were entirely separate. But an attorney who went down about a case and incurred certain expenses was entitled to recover them from somebody, and it evidently should be the party who had to pay the costs of the case. In this case it was shown that counsel had strongly advised that Mr. De Villiers should go down to George as an important witness, whose evidence might be indispensable. The Court had to depend a great deal upon counsel's discretion in recommending the appearance in Court of certain witnesses. Counsel must not send down witnesses whose evidence would not be wanted, and I do not think that the Bar did so. In this case it had been shown that counsel had advised that the witness should go down, and the application must be refused with costs."

An attorney is not personally responsible for the expenses of a witness subpœnaed by him, unless he has made a personal guarantee, but his client is liable for the expenses which may be incurred by the witness, who may recover it by action.[3]

A witness to whom conduct money has been paid, but who fails to attend the trial, can be compelled, by an action on the part of the suitor for whom he was subpœnaed, to refund the money paid him, besides being liable to an action for damages and incurring a penalty for contempt of Court.[4]

I have not been able to find any case decided as to

[1] *Laing* vs. *Bower*, 3 M. & S., 89; *Curtis* vs. *Platt*, 33 L. J. C. P., 255.

[2] *Chapman* vs. *Rodway*, 27 L. J., 7 Exch., and since then see Sup. Ct. Rules of 1878, § 4, order 4, and *Shields and Van Rooyen* vs. *Wehmeyer*, 7 B., 44.

[3] *Lee* vs. *Everest*, 2 H. & M., 285; and since then see Supreme Court Rules of 1878, § 12 of Order 4.

[4] See Chapters "*Subpœnas*" and "*Contempt of Court.*"

whether a witness called because of the evidence he said he was prepared to give, but who gave wholly different evidence at the trial, is entitled to his expenses from the party calling him. It appears to be just, however, that the expenses of such a witness should be refused. A witness when he gives his statement to the attorney or party subpœnaing him, is presumed to do so *bonâ fide*, and is expected to mention all he knows about the case, and to be prepared to confirm his statement on oath. Upon this good faith he is called. If, then, he deceives the party, he should not be paid his expenses; for if he had given a truthful statement, the party who found his evidence adverse would not have gone to the expense of subpœnaing him. Of course, a slight or an unimportant difference is excusable, especially under cross-examination; but no allowance can be made where his evidence substantially and materially varies, upon any important part of the case, from the information he gave as to what he was prepared to swear to, or where he has knowingly withheld from the party an important fact, which, if known in time, would have caused his attendance to be dispensed with. If a witness could not have anticipated that certain facts adverse to the party calling him would be elicited by the Court or in cross-examination, he could not then be said to have knowingly withheld material information. Upon this point, therefore, each witness must be judged as to his intelligence, means of information, and whether or not he might fairly be presumed to have known that the publication of the fact would be adverse to the party calling him.

A suitor, though successful, is not entitled to claim from his opponent the expenses incurred by his witnesses in consequence of their having been obliged to appear before his attorney a couple of days before the trial day, in order to have their evidence minuted, but should pay such additional expenses himself. He can recover from his opponent for such detention, in addition to the days actually occupied in travelling, only from the date they were obliged to be at the Court, that is, from the date for which the case was set down for trial;[1] since then the following rule has been made, that

[1] *Stephan* vs. *Losper*, decided in Supreme Court, February, 1878, not reported.

the party condemned in costs shall be liable for witnesses' expenses only "in respect of every day necessarily *occupied* in travelling to, remaining at, and returning from the Court." [1]

If a witness is examined before a commissioner or an arbitrator he is entitled to the same expenses as when attending a trial.

COSTS OF APPEAL.

From the Magistrates' Courts.

An appeal may be made from a Magistrate's Court decision, on the question of costs *only*, though the party may be satisfied with the rest of the judgment. In the case of *Van der Burg* vs. *Gebbard*,[2] the Court held that

"although it is in the discretion of the resident magistrate to give or refuse costs, this is a judicial discretion, and that the judgment given by the magistrate as to costs is subject to review in the same manner as his judgment on the merits of the case, and that where a judgment as to costs is brought under review, the Court of review must exercise their own judicial discretion as to whether it should be confirmed or altered." [3]

In the case of *Meisserheimer* vs. *De Smidt*, in appeal from a Magistrate's Court, heard by the Supreme Court in December, 1880 (not reported), the Chief Justice said :—

"I hesitate generally to interfere with the magistrate's decisions as to costs, but at the same time it was a judicial point, and it is really a serious question whether a magistrate should deprive a successful litigant of his costs. The plaintiff was successful, and there was no circumstance to deprive him of his costs, and I think the magistrate should not have made the plaintiff pay his own costs. The plaintiff will now, therefore, have his costs together with the costs of the appeal."

On the same day, in deciding an appeal from the same Magistrate's Court in the case of *Korsten* vs. *Van Noorden* (not reported), the Chief Justice said :—

"It would be a perversion of justice if a magistrate were to be allowed to give a judgment for a party and then make him pay his own costs upon no ground whatever."

[1] Rule 315, § 2.
[2] M., 3, 407.
[3] *Dodds* vs. *Barry*, B. for 1874, p. 41; Act 20 of 1856, § 33; and *Bennett and Webster* vs. *Coetzee*, 1 J., 285.

So in a case where a Magistrate had given a judgment for plaintiff for 12s., but ordered him to pay the costs of the case, the Supreme Court held that the Magistrate had not exercised a judicial discretion and altered his judgment for plaintiff to 12s. *with costs*, including the costs of appeal.[1] So also in the case of *Moloni* vs. *Conradie's Executor*,[2] the Supreme Court held that a Magistrate must exercise a judicial discretion as to costs, and that the Court will only interfere where he has not exercised it at all, or has proceeded on erroneous grounds.

From the Circuit Courts, the E. D. Court, and the High Court of Griqualand West.

A person who has sued in the Court below, *in formâ pauperis*, is not allowed to appeal without giving security for costs of appeal.[3]

I have not been able to find a case where an appeal has been allowed from a Circuit Court, or the E. D. Court, or High Court of Griqualand West, against a decree of costs only. But in the Supreme Court, during the argument of the case of *Campher* vs. *Raubenheimer*[4] which was an application to vary and to get an interpretation of an order of Mr. Justice Denyssen given in the Circuit Court of Mossel Bay in March, 1877, as to costs, the Chief Justice said that he would not allow an appeal from his decision in a Circuit Court upon the question of costs only.

But since then, by § 15 of Act 5 of 1879, it has been enacted that—

"no judgment, decree, or order made by the E. D. Court or any Circuit Court by the consent of parties, or *as to costs only*, which by law are left to the discretion of the Court, and no interlocutory order, shall be subject to any appeal, except by the leave of the Court, or judge, pronouncing such judgment, decree, or order."

This section of the Act is taken from the 49th section of the English Judicature Act of 1873. Since the passing of this latter Act the new Court of Appeal in England have

[1] *Adams* vs. *Sparks*, 2 C. T., 100.
[2] 6 C. T., 205.
[3] *Goldman* vs. *Glass*, 5 J., 76, and *Hilpert* vs. *Castle Mail Packets Company*, 6 J., 26.
[4] In May, 1877, not reported.

frequently refused to interfere with the decision of a judge as to questions of costs only, or where the appeal is substantially one for costs only, on the ground that they have no power to do so, and that the section is imperative.[1] Thus with us, as in England, unless the judge who decides the case consents to the appeal on the question of costs only, the Court of Appeal cannot entertain the appeal. The Supreme Court has awarded appellants their costs of appeal where they have succeeded in obtaining a material alteration of the judgment appealed from.[2]

From the Supreme Court, or Court of Appeal.

In an appeal from the Supreme Court, or Court of Appeal here, to the Privy Council, the claim for costs cannot be taken into consideration in estimating the value of the suit.[3] Therefore our Supreme Court, or the Court of Appeal, have no power to allow an appeal from their decision to the Privy Council as *to costs only:* and as the Privy Council does not allow an appeal for costs only, and the Appeal Court in England cannot entertain such an appeal without the leave of the lower Court,[4] which leave our Supreme, or Appeal Courts cannot give, it follows that on no account whatever can an appeal be heard in the Privy Council from a decision of our Supreme, or Appeal, Court, nor in the House of Lords from the new Appeal Court in England, as to costs only.

The Practice of the Privy Council, or the new Supreme Court of Appeal, as to Costs.

As it may be useful, in appeal cases from the Colony, to know what the practice of the Privy Council, or the new Supreme Court of Appeal in England, is as to costs, I shall give a few instances.

Before the year 1853 the general rule of the Privy Council was—

"that the party who defends the judgment of a competent Court in his favour shall not pay the costs of the appeal although he fails."[5]

[1] *Harris* vs. *Aaron*, 46 L. J. App. Ch., 488; *Asworth* vs. *Outrans*, Ibid, 687; *Graham* vs. *Campbell*, 7 Ch. D., 494, and 47 L. J. App. Ch., 593; *Chennel* vs. *Jones*, 47 L. J. App. Ch., 583.

[2] *Tutor Dative Paterson* vs. *Bramson*, B. for 1875, p. 40; *McDonald* vs. *Fourie*, decided August, 1876, not reported; *Kruger* vs. *Stænkamp*, decided May, 1877, not reported.

[3] § 50 of Charter of Justice, and *Norden* vs. *Oppenheim*, 3 M., 409.

[4] § 49 Judicature Act of 1873.

[5] 1 L. R. Ch. Div., 41 C. A.

But on the 13th of June, 1853, the Judicial Committee of the Privy Council issued an order, of which the first rule is as follows:—

"That, any former usage or practice of Her Majesty's Privy Council notwithstanding, an appellant who shall succeed in obtaining a reversal or material alteration of any judgment, decree or order appealed from, shall be entitled to recover the *costs of the appeal* from the respondent, except in cases in which the Lords of the Judicial Committee may think fit otherwise to direct."

The English Judicature Act of 1873 adopted the spirit of this Order in Council, by leaving the question of costs to the discretion of the Court;[1] and Lord Justice James, on the 10th November, 1875, while sitting in the Appeal Court, handed in the following memorandum:—

"I desire to mention this for the information of the profession. Under the new law, costs are in the discretion of the Court, and the opinion of the Judges of the Court of Appeal is that, as a general rule, the successful appellant will get his costs. The old rule of this Court, that the successful appellant has to bear his own costs, is no longer to be acted upon, unless the particular Court in the particular case shall make an order to the contrary. The rule is, however, not to apply to appeals which are pending at the time when the new system came into operation; such appeals will be dealt with according to the old practice."[2]

Under the new practice the Appeal Court in England has decided the following points:—

"Where an appellant fails in proving his allegations of fraud, as to which he has adduced a mass of evidence, but succeeds in a point of law, he is deprived of his costs by the Court of Appeal."[3]

"Where an appellant succeeds on a point not raised in the Court below, he will be allowed the costs in the Court below but not the costs of the appeal."[4]

But as, before the Judicature Act was passed, the Privy Council had by virtue of their order of 1853, above referred to, exercised their discretion as to costs, I shall give here a few examples as to their practice, which are applicable also under the Judicature Act. I take the following from McPherson's "Practice of the Privy Council," pp. 227–241:—

[1] 38 & 39 Vict. c. 77, order 55.

[2] L. R. Ch. Div. for 1875–76, Vol. I., p. 41.

[3] *Re Cooper*, 10 C. A. Ch. D., 313.

[4] *Husse* vs. *Payne*, 38 L. T., 543; 47 L. J. App. Ch. 751.

"No appeal will be heard by the Privy Council on the question of costs only."

"Where an appellant succeeds in obtaining a slight variation of the decree complained of, but the variation confers no real benefit on him, he gets no costs."

"Where there is no ground for appeal, of course the affirmance must be with costs."

"Where the decree is affirmed, but the respondent has acted discreditably and caused the litigation by his own acts (as where he caused the banns to be published in a false name and afterwards obtained a dissolution of his marriage on that ground), the affirmance is without costs."

"The Judicial Committee allows the costs of both parties to be paid out of the estate, whether the appeal be successful or not, in those cases only where the circumstances are such as would have justified the Cour below in making a similar allowance."

"In a case where the decree appealed from granted probate of a will and two codicils, and the appellant succeeded only in obtaining a reversal as to one codicil, which was of no great importance, Dr. Lushington observed, in delivering judgment as to costs, 'we think that this case eminently called for investigation; it was not till a bill in Chancery had been filed, and the case had come up here that all the facts were known; so that the enquiry as to the second codicil, with all its proper circumstances, could only be conducted in the appellate Court. We think this litigation was fully justified, and are of opinion that all the costs of the appellant in this Court, and in the Court below, should be paid out of the estate.'"

"The Judicial Committee (as has been already seen) deals with the costs of the proceedings in the Court below, as well as with those of the appeal, and they may order either or both to be paid by the respondent."

"Where a Colonial Court had suspended two Barristers for contempt of Court, and the Judicial Committee considered that the orders of suspension ought not to have been made, they simply reversed the orders; nor is there any case reported in which practitioners, or officers, who have appealed successfully, have been allowed the costs occasioned to them."

"Where there is an appeal and cross appeal, and each appellant in part succeeds, no costs are given to either party."

Though, where there was a difference in the Court below, the Privy Council reversed the Colonial decision with costs of appeal and costs below.[1]

For rule of the House of Lords as to costs, see "House of Lords Appeal Cases" for 1875–6.[2]

[1] *Mostert* vs. *South African Association*, B. for 1873, App., 2.

[2] Vol. I., p. 713, *Anderson* vs. *Morice*.

COSTS BETWEEN ATTORNEY AND CLIENT.

I have already mentioned incidentally some instances of costs as between attorney and client, and will now give a few more detailed examples by way of illustration.

Though your opponent may have been cast in costs, there are frequently costs incurred which, while necessary, cannot be properly charged against him, and should therefore be paid by your own client, and these are called "*costs between attorney and client*": for instance, costs incurred for your own information or exclusive advantage; or costs unnecessary for the purpose of the suit (but see attorney's liability); or the expense of making several affidavits for one deponent in the same suit where one would have sufficed, unless the subsequent affidavits be *bonâ fide*, and what are called "answering affidavits" to some facts not previously disclosed or known; or of engaging more counsel than are necessary and usually employed.

With us it is an old-established custom, that if a client wishes to enjoy the luxury of having more than two counsel, he should pay for it, as also for the third and further briefs. It has been decided in England that a very strong case must be shewn to induce the Court to sanction the allowance, as between party and party, of the fees of more than two counsel,[1] and more recently it has been decided that three counsel will only be allowed in *cases of great complication*, as where serious charges of fraud are involved, or the number of witnesses is large.[2] In the case of *Smith* vs. *Buller*, quoted above, the Court held also that it had the right, although it was reluctant to exercise it, to interfere with the amount of counsel's fees.[3]

Refreshers to counsel will be allowed as between party

[1] *Smith* vs. *Buller*, 45 Law J. Ch. Div., 69, 19 L. R. Eq., 473, and 9 Ch. D., 239, 47 L. J. Ch., 880, 26 W. R., 812.

[2] *Kirkwood* vs. *Webster*, L. Rep., 9 Ch. Div., 239; *Millard* vs. *Burroughs*, W. N., 1880, p. 4.

[3] As to counsel's fees generally in this Colony see next Chapter, *in re Edmeades* vs. *Mostert*; *Edmeades* vs. *Scheepers*; *Walker* vs. *Liquidator's Cape Central Railways*; *Logan* vs. *Colonial Government*; *Teengs* vs. *Garlick*; *Beaufort West Municipality* vs. *Wernich*; *Spengler* vs. *Sea Point Municipality*; *Roux* vs. *Roux*; *Treasurer-General of the Colony* vs. *Bosman*.

and party for every day, or part of a day, after one whole day's sitting; but unless the trial occupies in the whole more than one day's sitting, any refresher to counsel will be between attorney and client.[1]

What is called "Term Refresher" is also allowed as costs between party and party, if the case is carried over from one term to another.[2]

The expenses of a witness whose evidence is inadmissible, or not material to the cause upon any one issue, must, together with the costs of the subpœna to secure his attendance, be paid by the party whose witness he is.

You are not legally entitled to payment from the defendant of a fee for a letter of demand unless the case proceeds further. Rule 1 under A, § III., of the Magistrates' Court Rules of 1878 is as follows:—

"For demand made by letter before summons, addition to necessary postage, 1*s.* 6*d.*

"Copy of such demand, 1*s.* 6*d.*"

The Supreme Court held this Rule did not alter the common law, stated in the preceding and in the next paragraph.[3]

If the defendant tenders you the sum claimed or complies with what you demand of him, your own client should pay the expenses of the demand;[4] nor can you demand payment from the defendant of any other costs incurred by you, if he tenders you a settlement before the summons has actually been issued against him.[5] But, of course, if he tenders you a settlement after the summons has been issued out of the registrar's office, then he is bound to pay the fee for the letter of demand and all necessary correspondence with him or his attorney since the issuing of the summons, as well as the expenses of the summons. But correspondence before action

[1] *Brown* vs. *Sewell*, 16 Ch. D., 517; *Laurie* vs. *Wilson*, 44 L. J. C. P., 87; *Walker* vs. *Daniel*, 34 L. T., 899.

[2] *Edmeades* vs. *Mostert and others*, decided Supreme Court, July, 1882, and the other cases quoted above. See also Chapter "*Model Bills.*"

[3] *Lesar* vs. *Morrison*, 1 J., 30; *Redelinghuys and Wessels* vs. *Jones, Cosnett and Ball*, 3 J., 250; *Hepworth* vs. *Dunkley*, 3 J., 400; and *Jones* vs. *Cauvin & Co.*, 8 J., 217.

[4] See *Kirsten* vs. *Braithwate*, 1 M. & W., 310.

[5] *Haupt* vs. *Robertson and Bain*, B. for 1869, p. 1.

brought, except the letter of demand, is regarded as costs between attorney and client, and is not allowed under any circumstances as a charge between party and party. In the case of *Capel* vs. *Staines*,[1] Lord Abinger said :—

"The practice has been to allow for one letter, and one letter only, before action brought; and that practice ought not to be departed from. If more were allowed, it might lead to great inconvenience."

See also the same case as reported by Dowling, vol. 5, p. 770, where Baron Parke said :—

"It is much better to abide by the general rule. If this application were allowed, the next attempt would be to introduce a letter every day."

In the cases of *Dean* vs. *Colonial Government*, and *Hartley* vs. *Colonial Government* (not reported; see also p. 852), the Supreme Court (August 1882) held that charges before the summons was issued (excepting letter of demand) are costs between attorney and client, and added :—

"The taxing officer had only followed the practice of this Court from time immemorial (that is in not taxing correspondence before action brought as costs between party and party) and that of the English Courts also in disallowing them."

But since 1894 the T. O. has gradually expanded the interpretation of these decisions by allowing for correspondence before issue of summons, if material and necessarily occasioned, according to the circumstances of each case.

When no previous demand has been made before the issuing of the summons, the defendant, if he tenders the amount claimed in the summons upon the service thereof upon him, or within a short and reasonable time thereafter, can thereby free himself from the payment of the plaintiff's costs; nay, more, he is even entitled to recover from the plaintiff the costs he has been put to in opposing judgment, on the ground of his tender of the amount claimed in the summons, and the want of demand on the part of the plaintiff.

A demand should therefore, in all cases, precede a

[1] M. & W., Vol. 2, p. 850, decided in 1837.

summons, so as not to put your client to unnecessary costs.[1]

Costs of an application and proceedings merely collateral to the cause or any *ex parte* application are always costs between attorney and client, unless the Court specially orders that they shall be costs in the cause. So also the costs on proceedings not generally necessary in the suit, and not caused by the other side, but which are resorted to for the peculiar benefit of the party by whom incurred and are merely precautionary or supplementary rather than incidental, are between attorney and client. Expenses of journeys, surveys, and experiments to enable a witness *to acquire such knowledge as will qualify him to give evidence*, and even where an accountant may have been employed to examine the books, were formerly between attorney and client, but are now between party and party, where under special circumstances the Court think it necessary and just and have been assisted thereby.[2]

The costs of any particular proceeding, wrongly occasioned by either party, will fall on that party, as also will the expenses incurred for inspection and discovery and costs of view, unless otherwise ordered by the Court. Costs for indulgence, such as granting time, or for amending summons or any pleadings, are also always between attorney and client, unless the Court otherwise specially directs.

Expenses on obtaining counsel's opinion, or on a conference, or consultation, or advice, or retainer, are between attorney and client; but, by long usage and custom in this Colony, the advice on evidence, and a conference on brief with client and witnesses, are now costs in the cause. Although a retainer is properly a charge between attorney and client, the Court, under the peculiar circumstances of the case of the *Ceres Municipality* vs. *Arnholtz*,[3] allowed a special retainer

[1] Gul. Grotii Isag. 1, 4, 6; Merula, 4, 21, 1; V. d. Linden, Jud. Prac., I., I., 8, 8; *Faure* vs. *Wright*, 1 M., 21; *Brink* vs. *Gwagh*, 2 Ibid, 256; *Redelinghuys* vs. *Theunissen*, Ibid, 258; *Orlandeve* vs. *Pope*, Ibid, 260; *Steytler* vs. *De Villiers*, Ibid, 286; *Johnstone* vs. *Kotze*, Ibid, 284; *Barry* vs. *Bains and Weedham*, 3 Ibid, 437; *Dodds* vs. *Barry*, B. for 1874, p. 41.

[2] *Wynberg Municipality* vs. *Clayton*, 3 C. T., 200; *Logan* vs. *Colonial Government*, Ibid, 225; B. for 1875, p. 122; *O'Shea* vs. *Town Council of Port Elizabeth*, 5 C. T., 173.

[3] B. for 1868, p. 2.

of 25 guineas as a charge between party and party. The peculiar circumstances were, that as there was only one counsel on circuit, and he acted for the plaintiff, the defendant had to come to town from Malmesbury to engage a counsel. The taxing officer disallowed the item, and on a motion being made to the Court to allow it as between party and party, the *plaintiff did not appear to oppose*, and this fact probably weighed with the Court in allowing the item as between party and party.

Costs of a Commission to examine witnesses of one of the parties in a cause, if the evidence turns out to be not material to the suit, are between attorney and client; but if the evidence is material, or the Commission a joint one, and the order is silent as to costs, then the costs are costs in the cause.

Costs which may have been prematurely incurred are between attorney and client; for instance, in preparing for trial, instructing counsel and drawing the brief before the notice of trial is given, if the plaintiff should not proceed with the case, or the defendant should tender what is demanded of him.[1]

Proving the execution of a document without first giving the opposite party an opportunity of admitting it also ranks as costs between attorney and client. If the execution of such a document is not clearly denied on the pleadings, then a letter should be written, inquiring whether the party will admit its execution or not.

Costs as between attorney and client are taxable upon the same principle as those between party and party. On the review of the bill of costs in the case of *Spengler* vs. *Municipality of Sea Point*,[2] the Attorney-General, who appeared for the plaintiff, quoted Voet, 17, 1, 10, and Digest 17, 1, 27, 4, and argued that an attorney was entitled to his costs between attorney and client, which the taxing officer had disallowed; but the Chief Justice, in delivering the judgment of the Court, said:—

"He declined to interfere with the discretion of the taxing master. He could find nothing to show that in England any difference was made

[1] *Cooper* vs. *Boles*, 5 H. & N., 180; *Galloway* vs. *Keyworth*, 23 Law J. C. P., 218; and *Curtis* vs. *Platt*, 33 L. J. C. P., 255.

[2] Decided in 1883, not reported; see also pp. 866–868.

as to the discretion of the taxing master as between party and party and as between attorney and client. That discretion was even allowed to override a special agreement. He referred to the case of *Drax* vs. *Scroupe*,[1] and cited decisions given by Lord Tenterden, and Littledale and Parke, J.J. It had been said that the attorney, like an ordinary agent, was entitled to recover his fair disbursements. But that was a fallacious argument, for the attorney was an officer of the Court and bound by its rules. The contract between him and his client was that the latter should pay all costs allowed by the taxing master; nor had the Municipality in their letter agreed to exercise any other."[2]

It is unnecessary specially to treat of costs between party and party, as it will be seen, from what has been already stated as to costs between attorney and client, what these are.

AN ATTORNEY'S LIEN FOR COSTS.

The *jus retinendæ possessionis* of the Roman law served no doubt as the basis of the English law on "Lien," for there is a remarkable resemblance between them; while we know, as a fact, that the subject is not so ancient in England, and that it was sanctioned there by universal custom. The English precedents are therefore valuable where they interpret, but do not differ from, the Roman doctrine.

A lien, then, may be defined as a "right which one man has to retain that which is in his possession, belonging to another, till certain demands are satisfied."

It is therefore only a right to hold, and attaches to property coming into the possession of a person claiming the lien. This right of lien only attaches in the case of an attorney duly qualified and authorized to act, but when it has once attached, it remains even after the qualification of the attorney has ceased.

By the law of England an attorney's lien is more extensive than by the law of this Colony; for if a deed or anything else is given that he may do any work on it, he has by the law of this Colony his lien upon *that thing only* for his charges. But in England an attorney has a lien, not only on account of such work or for other labour professionally

[1] 1 Dowl., 78.

[2] See the same case, and also on other points more fully stated in next Chapter.

bestowed or money expended on behalf of his clients, but *also upon all other documents of his clients coming into his hands in the course of business* (whether they have reference to the same transaction or not, and whether he has received them before or after the particular occasion which gave rise to the debt on account of which the lien is maintained, or whether the papers, &c., of the client are delivered for the purpose of perusing, copying, abstracting, or merely exhibiting to a witness on the trial of an action), and also on money and property generally coming into his hands *for the purpose of being used in legal proceedings.*[1] But by our law an attorney's lien is *not so extensive*, and is *only for any specific work done in or on the preparation of any document or deed.* Notaries and conveyancers have similar rights.[2] Attorneys are especially forbidden, by the law of Holland, which on this point is in force in this Colony also, to retain any documents belonging to clients as security for unpaid costs, except for such specific lien as before mentioned.[3] It is to be observed, however, that this lien of an attorney, notary, or conveyancer attaches *only to the papers and documents, &c., which come into his possession in the course of his employment as an attorney, notary, or conveyancer* in his *professional* capacity; and does not attach therefore to documents, &c., which he acquires in a different capacity.

In the case of *Laubscher* vs. *Hofmeyr*,[4] where the plaintiff claimed the restitution of certain papers entrusted by her as executrix of her husband's estate to the defendant, an attorney, for the purpose of liquidating the estate, while the defendant on the other hand claimed a lien on the papers by virtue of a debt due by the deceased to him, and for commission for administering the estate, &c., the Court decided that—

"the defendant had no right of general detention of documents for the payment of his commission or cash balance; it decided also that an agent or an executor had no lien on documents belonging to an estate administered by him unless he could show a special right."

[1] *Taunton* vs. *Goforth*, 6 D. & R., 384; *Ex parte Jabet*, 6 Jurist (N.S.), 387; *Jones* vs. *Turnbull*, 5 Dowl., 592; *re Nesbitt*, 2 Sch. and Lef., 279.

[2] See "Liens" in Chapter "*Hypothecations.*"

[3] G.P.B., Vol. 2, p. 722, Art. 80; Ibid, p. 813, Art. 166.

[4] Decided November, 1871, not reported.

An attorney's lien is not lost by his insolvency or that of his client, nor by the death of either of them; for when he can no more hold the lien personally by reason of death or insolvency or assignment of his estate, his right passes to his representative against the client, or against the estate of the latter.[1] Nor is the lien lost by his entering into partnership, but will continue even though partnership is dissolved or he retires from practice.[2]

The attorney, *having a lien on the papers in a particular suit*, will be ordered to deliver them up on payment of his bill of costs in such a suit, and the client cannot, in such a case, be compelled to pay also the general balance due by him to the attorney; but if the client's money come regularly into his attorney's hands, the latter has the right of *set-off for his general costs*, and this right not only extends to the general balance, but also to the costs of an action properly brought for its recovery.

As long as an attorney's lien lasts he cannot be compelled even to grant an inspection of the papers in his possession, unless his bill be paid, or satisfactory security be given; nor can he be forced to afford any facility to the client by the use of the papers, or to deliver them up for the purpose of the cause.[3] But if a case of pressing necessity be made out, and if justice cannot otherwise be obtained, then the Court can, in its discretion, order the production of the documents on which the lien is claimed, provided that their production can in no way affect, or be prejudicial to, the attorney's lien.[4] But he need not part with them; he is bound only to produce them on a *subpœna duces tecum*.[5]

In the case of *De Villiers* vs. *Berrangé*, heard in the Supreme Court on the 31st August, 1877 (not reported), the Court granted the applicant, who was a former partner of

[1] *Re Davies*, 12 L. J. (N. S.), 456; *Stephenson* vs. *Blakelock*, 1 M. & S., 535.

[2] *Hope* vs. *Liddell*, 7 D. M. & G., 331.

[3] *Griffiths* vs. *Griffiths*, 2 Hare, 587, 592; *Twort* vs. *Dayrell*, 13 Ves., 195, 197; *Bacon* vs. *Holland*, 4 My. & C., 358. Consult also Voet, 16, 2, 21, and Cens. For. 4, 37, 13; Sande, 3, 15, 5.

[4] *Commerell* vs. *Poynton*, 1 Swanst, 2; *L. and W. Ry. Co.* vs. *O'Ferrall*, 1 Jur., 193; *Richards* vs. *Platel*, T. & R., 79; *Newington Local Board* vs. *Eldridge*, 12 C. D., 349; *Scott* vs. *Fenning*, 15 L. J., Ch., 88.

[5] *Re Toleman*, 42 L. T. Rep. (N. S.), 413; *Fowler* vs. *Fowler*, 44 L. T., 799.

respondent, leave to inspect all documents in possession of the respondent, connected with a suit which came into the hands of the parties during the existence of the partnership; the defence being that the object of the applicant was to obtain inspection for the purpose of assisting a former client, since insolvent, in another suit, and that if inspection were granted, the partnership lien on the papers would be lost. The Chief Justice decided in this case—

"That the question of lien did not arise in this application, and that the point in dispute between the parties must be settled by the ordinary rules of partnership, and that, in the absence of a special agreement to the contrary, each party had an equal right with the other to inspect all documents connected with the late firm, and that the mere fact that it was for the purpose of making use of information gained by the inspection, for the benefit of the client, did not really affect the case."

The attorney has no lien on any private deeds of one partner in respect of business done for the firm.[1]

If an attorney proves his claim upon his client's insolvent estate without specially reserving his lien, or if he agrees to the assignment of the estate, or if he takes a bond or a promissory note from him for his bill of costs, he loses his lien, and it will not be revived even if the bond remain unpaid and the promissory note should afterwards be dishonoured.[2] But if he wishes to prove his claim upon his client's insolvent estate, without losing his lien thereby, he should, if it is not disclosed on the face of the deed, state the nature of his lien, and that he does not wish to waive his right of lien by proving the claim. Lord Chancellor Sugden, in the case of *Taylor* vs. *Gorman*,[3] said:—

"If he (the attorney) did not mean to waive his lien at the time, he ought to have set up his title by reason of the possession of the deed. He cannot now set up that right by proof of the creditors consenting to it, nor is such a right given by the decree, which only saved his rights, if he had any."

By §§ 27 and 30 of Ord. No. 6 of 1843 every creditor claiming must prove his claim on the insolvent estate, and if he has a lien, he would do well to follow the advice of Lord

[1] *Turner* vs. *Deane*, 3 Exch., 836.
[2] *Re Solomon*, 1 Glyn & J., 25; *Roberts* vs. *Jeffreys*, 8 L. J. (O.S.), 137, 140; *Ex parte Spottiswoode*, B. R., 20.
[3] 7 Jr. Eq. Rep., 259.

Sugden; for if he stand aloof, though he may maintain his lien, he cannot, after the rehabilitation of the insolvent, sue him on the lien,[1] and besides whatever right the insolvent has becomes vested in his trustee.[2]

Besides this lien on his client's documents the attorney may also have a *lien to a certain extent on his client's money coming into his hands*, whether by a judgment or by arbitration or compromise. If the money gets into his hands, he may retain to the amount of his bill and for the charges due by virtue of his right of set-off, and he may even stop it in transition if he can lay hold of it.[3]

But to the general rule that an attorney has a lien for *special work done on certain documents* of his client, or the *right of retention or of set-off of the client's money* coming into his possession, there is an exception in the case of documents, or money, *delivered for a specific purpose, inconsistent with the general lien.* For instance, in a case where the client handed to his attorney a deed, simply to show it to a third party, to satisfy him that the client had made provision for payment of his debts, it was held that not being delivered *for the purpose of business*, the deed did not become subject to the lien; so also where an attorney received money from his client for the specific purpose of paying off a mortgage, and did not do it but claimed a lien on it for costs, it was held that he was not entitled to the lien, and he was summarily ordered to repay the amount.[4]

The right of the attorney's lien is *commensurate only with the right of his client*, and if the right of the client be limited to a certain extent, the attorney has a lien to the same extent only, and no more; *so if the right of the client to the subject of the lien ceases, the lien ceases also*, as, for instance, where a client has only a life interest in an estate, the title deeds to which formed the subject matter of the lien on the death of the client, the lien ceases.[5]

[1] Ibid, § 120.

[2] Ibid, § 48.

[3] *Welsch* vs. *Hole*, Dougl., 238; *Bishop* vs. *Higgins*, Barnes, 38; *Marr* vs. *Smith*, 4 B. & Ald., 466.

[4] *Champernoun* vs. *Scott*, Madds & Geld, 93; *Vaughan* vs. *Van der Stegen*, 2 Drew, 409; *Re Pemberton*, 18 Ves., 282.

[5] 2 Cr. M. & R., 420, *per* Holland, B.; 2 Dr. & W., 405; *Re Blunden* vs. *Desart*, *per* Lord St. Leonard.

The lien of an attorney is like a security, and he can set up a defence of the lien if a claim is made for the subject matter upon which he holds his lien, and this defence will be a good one, even though his right to an action for his costs may be barred by prescription, for a lien is not determined by prescription.[1]

The "statute of limitation" (said the Court in *Higgins* vs. *Scott*[2]) "bars the remedy but not the debt." And Lord Eldon, in *Spears* vs. *Hartly*,[3] said :—

"That though the statute has run against a demand, if a creditor obtain possession of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of his lien."

But when he gives up possession of the things or money on which he had the lien, then his right of retention perishes, and his lien is at an end, even though he may have given up possession by mistake.[4] Mr. Justice Littledale[5] said :—

"If the plaintiff parted with the possession of the papers by his own act (though by mistake), he has no longer any lien upon them ; but if they were got out of his possession wrongfully, his lien remains."

A town attorney, acting as agent for a country attorney, has, as against the country attorney, a lien on papers in a particular matter which come into his possession in course of that employment for what he owed him thereon.[6] But observe the distinction drawn as to a lien upon papers, &c., if received direct from the client, or if received through that client's local attorney. In the former case, as already discussed, the lien remains good as against all the world. Not so in the latter case ; for if the client had settled with the attorney whom he directly employed, and if he is not aware of the city attorney's lien, he has nothing to do with this attorney's principal or city attorney, who may really have conducted the suit or did the business required. Of course, as long as the client has not yet paid the local attorney, the principal attorney can

[1] *G. A. and C. W. Raily & Co.*, 29 L. & J. Chan., 383 ; *Re Broomhead*, 16 L. J. G. B., 355.
[2] 2 B. & A., p. 413.
[3] 3 Esp., 81.
[4] *Jacobs* vs. *Latour*, 5 Bing., 130, 132.
[5] In the case of *Dicas* vs. *Stockley*, C. & P., Vol. 7, p. 587.
[6] *Taunton* vs. *Goforth*, 6 D. & R., 384 ; *Scrace* vs. *Whittington*, 2 B. & C., p. 11 ; *Ward* vs. *Hepple*, 15 Ves., 297.

detain the papers. In the case of *Waller* vs. *Holmes*,[1] Vice-Chancellor Wood said :—

"The lien is limited to the debt actually due from the client to the country solicitor; no man can confer on another a greater interest than he has himself, and a country solicitor could give a town agent no lien which he did not himself possess; it might have been arranged anyhow that there was an implied authority given to the country solicitor to confer the lien as the client knows that an agent must be employed, but that view does not seem to have been taken, and the cases are against it. In fact, the London agent is always taken to give credit to the country solicitor and not to his client, of whom he knows nothing. The country solicitor having a lien upon the documents in his possession may be capable of conferring that lien upon the London agent, but here there is nothing due to the country solicitor; he has no lien, and consequently the London agent can derive none from him. The documents must therefore be delivered up."

A town attorney or agent has no lien for the general balance due to him from a country attorney upon money of his client on the latter coming to his hands in a cause in which he acts as such town agent, because he must have known that the money was received for the client's use.[2]

A lien is not lost by an attorney bringing an action against his client.[3]

WHEN AN ATTORNEY IS NOT ENTITLED TO ANY COSTS, AND IS LIABLE TO PAY COSTS.[4]

THE TAXING OFFICER'S FUNCTIONS IN TAXING COSTS.

It was formerly the practice for the Court, or one of the Judges, to tax the costs in any case,[5] but the Court's functions in this respect are now performed by the taxing officers appointed by the respective High Courts, or by the Judge's Registrar on Circuit, all of whom have the power, without

[1] L. J., Vol. 30, p. 24.
[2] *Moothy* vs. *Spencer*, 2 D. & R., p. 6.
[3] *Higgins* vs. *Scott*, 2 B. & Ad., 413.
[4] See Chapter XLII.
[5] V. d. Linden, Jud. Prac., II., Chap. 8, §§ 2, 3, and 4.

further or special reference from the Court, to tax all bills of costs of their respective Courts of which due notice of taxation has been given. The taxing officer of the Supreme Court has, however, the additional power of taxing all the Circuit Court bills of costs; the Registrars of the E. D. Court and of the G. W. Court only bills of their respective Courts and Circuits,[1] while the Registrar of the Circuit Court has power only to tax bills of costs incurred in the Circuit Court in which the case was decided and in which he acted as Registrar and while on Circuit.[2] The powers of the taxing officer are defined by the 36th and 207th Rules of Court.

The fees to be taken by the taxing officer on the taxation of a bill of costs are 1*s.* in every £ or fraction of a £ taxed.[3] The party who is condemned to pay the costs must also pay the taxing officer or Registrar's fees for taxation, and the necessary expense attending the taxation of a bill of costs.

When the taxation is completed by the taxing officer, he grants his certificate, or *allocatur*, as it is technically called, of the final result; this *allocatur* should show the amount deducted, and should state the amount at which the bill has been taxed.

Usually it is written at the foot or across the bill of costs. No bill of costs, or any item thereof, can be reviewed unless the taxing officer's *allocatur* has been granted.

The taxing officer should not tax a bill of costs without proof being shown to him that the party against whom the bill is to be taxed has had notice of taxation, unless he appears in person or by his attorney; or if the case is an unopposed liquid one.

A taxing officer cannot tax a bill of costs for *general professional* services, nor in respect of *non-contentious* matter only. Such a bill does not require taxation.[4] Still, if the client desire it, and can shew reasonable cause for it, there is nothing to prevent the Court specially referring such a bill to the taxing officer for taxation. Such an application should

[1] See Rules of Court, 36 and 207; Pr. 5 of § 20 of Act 21 of 1864.
[2] Rule of Court 207.
[3] Act 20 of 1884, Sch. 2, III.
[4] *Elliott* vs. *Taylor*, 6 J., 18; and *Burger* vs. *Cape Central Railways*, Ibid, 130.

be by petition to the Court for relief; and notice should be given to the attorney.

If an attorney wishes to have his own bill taxed against his client, he should produce proof to the taxing officer that the client has received notice of taxation.

Besides proof of the service of the notice of taxation, there should also be proof shewn to the taxing officer that a copy of the bill of costs to be taxed has been served upon the party. This proof is usually an affidavit of service of the notice and of the bill of costs. If the taxing officer is satisfied that due notice has been given, and the party fails to appear at the time fixed in the notice, he may without further delay tax the bill in his absence.

No notice of taxation is necessary of bills of costs in liquid cases, where provisional sentence has not been opposed, because the fees are fixed and are always the same; the taxing officer requires proof only that the Sheriff's charges (which vary) are correctly brought up in the bill, and for this purpose the Sheriff's initials, or those of his clerk, are sufficient. But if provisional sentence has been opposed by the defendant, then, as additional charges are incurred thereby to the usual model bill, the party who has to pay the costs, or his attorney, should get notice of taxation.

A client can also demand to have his attorney's bill of costs taxed, and if the bill contains only one taxable item, then the whole bill may be taxed, otherwise not.[1]

There is no time fixed either by law or by custom for the length of notice to be given before a bill can be taxed, but a fair and reasonable notice should be given.

In Cape Town this average period is 24 hours' notice. But if the time of taxation has been fixed, the other party may obtain a postponement on sufficient cause being shown to the taxing officer, who usually fixes the day and hour beforehand.

There are no special days for taxation; a bill may be taxed by the taxing officer on any business day, and he cannot postpone or delay a taxation without satisfactory reason.

[1] *Slater* vs. *Brooke*, 9 Dowl., 349. But see *supra* as to non-contentious matter.

The taxing officer may adjourn the taxation if not completed on the day it began.

If the party against whom the bill of costs is taxed should complain that neither he nor his attorney had received notice of taxation, the taxing officer cannot, without the consent of the other side, retax the bill, and the party aggrieved should apply to the Court for a fresh taxation, or a review of the taxation, but he must first prove the non-service of the notice and of the bill.[1]

A party wishing to object to any part of a bill of costs should do so before the taxing officer, by pointing out to him the items he objects to and stating the grounds of his objection.

Any objection to the taxing officer's allowance or disallowance, or reduction of an item, should be made before he has affixed his *allocatur* to the bill of costs.[2] And the taxing officer, when allowing or disallowing an item to which either of the parties objects, is bound to assign the grounds and reasons of his decision thereon. If a party appear before the taxing officer, and do not then object to his taxation, or, having had due notice, do not appear, he cannot, after the taxing officer's *allocatur* has been affixed, object to any item to which he did not make his objection before the certificate was granted. On the motion of *Meyring* vs. *Meyring's Executors*,[3] the Chief Justice said :—

"There was no doubt that the general rule was that the party objecting should first object to the taxation before the taxing officer, and afterwards, if necessary, appeal to the Court."

The taxing officer must confine his inquiry to matters connected with the bill before him, and cannot go into matters foreign to the bill.

He is bound carefully to consider the objections made, and if he deems further inquiry necessary, or wants further information, he can adjourn the taxation. He may receive and take evidence on both sides in the case of controverted

[1] *Levy* vs. *Drew*, 5 D. & L., 307.

[2] *Parsons* vs. *Ritchie*, 4 Bing. (N.S.), 306, and 6 Scott, 299; also 30th additional rule to the English Judicature Act of 1875.

[3] Decided Supreme Court, Feb, 1880, not reported.

charges; for instance, when an attorney makes a charge for something done out of the regular course of his professional business, the burden of establishing his right to charge in respect of such item will lie upon the attorney; also, if an attorney is sent by his client upon a journey, he will have to shew, not only the authority for making the journey, but that he has given such attention to the matter in hand as will entitle him to the charge made in respect of it.

In taxation of costs the taxing officer is bound to conform to the rules and directions that may have been framed by the Court, or to the instructions given to him by the Court from time to time, or to take as his criterion the decision of the Court on questions of costs. The taxing officer has no power to allow interest on a bill of costs, though the client may have agreed to pay interest; nor can he tax a paid bill, without an order of Court, unless the parties consent thereto. The taxing officer's duty in taxation is to allow all disbursements, costs, and charges that the attorney has been put to and is entitled to make. He has to regulate the charges according to the usual and established scale of costs. He ought to disallow such items as are not properly vouched for before him, or appear to have been unnecessarily incurred; his duty is to moderate the charges of an attorney, but he cannot decide the question of his negligence, which can be done by the Court only. But though the taxing officer cannot decide the question of negligence of the attorney, it is in his power to decide as to the propriety of the charges, and whether the proceeding was useful or necessary; for instance, if the charge ought never to have been made because the business ought never to have been done, the taxing officer may disallow the charge.[1]

The taxing officer must decide also whether the business charged for was, under the circumstances, necessarily done or not, or whether the expenses incurred are reasonable or not. He has great discretion allowed him by the Court as to the question of charge for particular items, but wherever these, or the rate of remuneration to counsel or attorney, are not

[1] *Nelson* vs. *Slack*, 2 M. & Scott, 820; *Morris* vs. *Parkinson*, 3 Dowl., 744; *Heald* vs. *Hall*, 2 Dowl., 163; *Drag* vs. *Scroop*, 2 B. & Ad., 581.

fixed by positive tariff, he must be guided by certain rules recognised in taxation of costs, the object in such cases, in the absence of a tariff, being as far as possible to regulate the remuneration according to the value of the services rendered, and to the nature and magnitude of the case and the number of witnesses to be examined. Lord Langdale, in the case of *Lucas* vs. *Peacock*,[1] said :—

"The professed object is to adapt the remuneration to the value of the services rendered, though it has frequently failed to effect that purpose."

On the taxation of allowance to witnesses, it is the duty of the taxing officer, in case of an objection, to inquire and consider whether or not the witnesses were necessary and material,[2] and in order to ascertain this, he may make use of counsel's opinion and advice on evidence.[3]

Immediately a party has obtained the taxing officer's *allocatur* upon a bill of costs, he may, without any further delay, issue a writ against his adversary for the amount, unless there is an order of Court staying the execution for a certain period.[4]

The taxation of the taxing officer is subject, upon the application of either party, to be reviewed, confirmed, or altered by the Supreme Court or any Judge thereof; and the taxation of the registrar of circuit is subject to be reviewed by the Circuit Court in which the action was heard, or by the next ensuing Circuit Court for the same district; it may be reviewed also by the Supreme Court or any Judge thereof.[5] But in the case of *Trusby* vs. *Swemmer*,[6] the Supreme Court refused to review a Circuit Court bill of costs taxed by the registrar of circuit, on the ground that the notice to review a Circuit Court bill by the Supreme Court should be served on the party and not upon his attorney.

The party who is dissatisfied with the taxing officer's taxation can bring it under review, upon notice of motion to

[1] 8 Bear, 10.

[2] *Kotze* vs. *McLachlan*, B. for 1875, p. 6; also *Hugo* vs. *Fick*, not reported, decided June, 1876.

[3] *Rabie* vs. *Naudé*, B. for 1875, p. 3; also *Shiels and Van Rooyen* vs. *Wehmeyer*, decided 15th May, 1877, not reported.

[4] Rule of Court 36.

[5] Rule of Court No. 201.

[6] B. for 1868, p. 218.

the opposite party. This notice, or the affidavit in support of it, should specify the items objected to, and the grounds of the objection should be assigned. The affidavit should state also that the objections were duly brought to the notice of the taxing officer, that he has not entertained them to the extent urged, or that he has totally disallowed them; for the Court requires that the objectionable items should be specified and reasons given, in order that the subject matter in controversy may be dealt with at once, and the time of the Court not unnecessarily wasted by going over the rest of the bill already disposed of by the taxing officer.

Though no time is fixed within which the taxing officer's taxation should be reviewed, the party wishing to bring it under review should do so within a reasonable time, otherwise the Court will not entertain his application.

In the case of *Laurence* vs. *Ward & Wessels*,[1] the Court suggested that, wherever the taxing officer's taxation is to be brought under review, he is to have due notice of it, so as to allow him sufficient time to prepare his report and to be present at the hearing of the motion. This has been the constant practice since.

The Court can, in its discretion, make any order that seems just on the review of the taxing officer's taxation. It can review, confirm, or alter. If the taxing officer makes a mistake, whether on a point of law or principle, or as to the allowance, or disallowance, wholly or partially, of any item, the Court will set him right.

The costs on the notice of review are also in the Court's discretion; and the Court does not exonerate the unsuccessful party from paying costs of application by reason of the taxing officer's mistake.[2]

[1] 1 C. T., 214.

[2] *Rabie* vs. *Naudé*, B. for 1875, p. 3; *Meintjes* vs. *des Vages*, 2 J., 11.

FORMS ON PROCEEDINGS RELATING TO COSTS.

Notice calling on the Plaintiff, who is not domiciled in the Colony, to give security for costs.

In the Supreme Court of the Colony of the Cape of Good Hope.

Between A.B.,
Plaintiff,
and C.D.,
Defendant.

Sir,—Take notice that the Honourable the Supreme Court will be moved on the . . . . day of . . . ., at 10 o'clock in the forenoon, or so soon thereafter as counsel can be heard on behalf of the above defendant, at which time you will be required to shew cause, if any, why, before proceeding further with the above case, you shall not be ordered to find and to give good and approved security for the costs and charges that may be incurred by the said defendant in and about defending the said action, by reason that the said plaintiff is not an inhabitant of, or domiciled in, this Colony or within the jurisdiction of this Honourable Court.

And to shew cause, further, why you shall not be ordered to pay the costs of this application.

Dated at Cape Town, this . . . . day of . . . .

Yours, &c.,
C. H. Van Zyl,
Defendant's Attorney.

To
. . . . . ., Esquire,
Plaintiff's Attorney.

Affidavit in support of preceding notice.

In the Supreme Court of the Colony of the Cape of Good Hope.

Between A.B.,
Plaintiff,
and C.D.,
Defendant.

I, ..., of Cape Town, Attorney for the above defendant, make oath and say :—

1. That on the . . . . day of . . . . the said plaintiff issued out of the office of the Registrar of this Honourable Court a summons against the said defendant, for payment of the sum of £ . . . . sterling, alleged to be due to him on a certain open account for goods sold and delivered to the defendant.

2. That thereafter on the . . . . day of . . . ., at the request of the

said defendant, I wrote and delivered to the plaintiff's attorney a letter, demanding security for costs, a true copy of which is hereunto annexed, marked A., to which letter I have up to this moment received no answer (or which security the plaintiff declined or failed to give).

3. That the said plaintiff resides in . . . ., where he carries on business as a general importer, and he is not a resident of, or domiciled in, this Colony or within the jurisdiction of this Honourable Court, and that the said defendant has no security whatever from the said plaintiff for any costs that may be incurred in the defence of the said action.

Sworn to at Cape Town, this . . . . day of . . . .

Before me,

. . . . . .

J. P.

Letter A referred to in foregoing affidavit.

Cape Town, 19—.

To

. . . . . ., Esq.,

Attorney-at-Law, Cape Town.

A.B *vs.* CD.

Dear Sir,—I am instructed by the defendant in this case to demand from your client good and approved security for the due payment of any costs that may be incurred by him in and about defending this action, on the ground that the plaintiff is not an inhabitant of, or domiciled in, this Colony; and to state that if this demand be not complied with before (here state within what time), an application to the Supreme Court will be made to compel him thereto.

Yours truly,

. . . . . .

Defendant's Attorney.

Notice of motion calling on a husband to advance a certain sum of money to pay the expenses of his wife in an action of divorce and also for alimony.

In the Supreme Court of the Colony of the Cape of Good Hope.

Between A.B. (born . . . .), wife of C.D.,
Applicant,
and the said C.D.,
Respondent.

Sir,—Take notice that application will be made to the Honourable the Supreme Court on . . . . the . . . . day of . . . . next, at 10 o'clock in the forenoon, or so soon thereafter as counsel can be heard, on behalf of the above applicant, at which time you will be required to shew cause, if any, why you shall not be ordered forthwith to pay over to her a certain sum of money, to be fixed at the discretion of the Court, sufficient to enable her to institute proceedings against you for a divorce "*a vinculo matrimonii*" by reason of the adultery committed by you on the . . . . day of . . . . with one . . . ., at . . . ., situate in the district of . . . .,

and also to pay over to her a certain sum of money, by way of alimony, sufficient to enable her to maintain herself, according to her station in life, pending the said suit; and also to shew cause why you shall not be ordered to pay the costs of this application.

Dated at Cape Town, this . . . . day of . . . .

Yours, &c.,

. . . . . .

Applicant's Attorney.

To . . . . . .,

of . . . . . .,

The above Respondent.

Affidavit in support of the foregoing notice of motion.

In the Supreme Court of the Colony of the Cape of Good Hope.

Between A.B. (born . . . .), wife of C.D.,

Applicant,

and the said C.D.,

Respondent.

A.B. . . . . of . . . ., the above applicant, maketh oath and saith :—

That she was on the . . . . day of . . . . married at . . . . in this Colony to C.D., then a bachelor, the above respondent, in community of property, according to the laws of this Colony.

That after the said marriage she lived and cohabited with her said husband at . . . ., and at . . . ., and that she and her said husband have had issue of their said marriage . . . . children, to wit :—. . . . sons and . . . . daughters.

That she intends to institute an action against her said husband for divorce "*a vinculo matrimonii*" by reason of the adultery committed by him with one . . . ., on or about the . . . . day of . . . ., at . . . ., situate in the district of . . . .

That she has no means wherewith to carry on her said action nor to maintain herself "*pendente lite.*"

That to the joint estate of herself and her said husband belongs a farm called . . . ., situate in the district of . . . ., and valued at £ . . . . sterling, and also . . . . sheep, ... goats, ... horses, and . . . . head of cattle, valued together at about £ . . . . sterling.

That the said respondent has been for many years and is still carrying on the business of . . . . at . . . ., and from such business derives an annual income of about £ . . . . sterling.

That he has also a certain share in the . . . . company, amounting in value to £ . . . . sterling, and yielding a clear annual dividend to him of £ . . . . sterling, and,

Lastly, that the said respondent is possessed also of stock-in-trade in his said business of . . . ., to the value of about £ . . . . sterling, and yielding an average annual income of about £ . . . . sterling.

Sworn at . . . ., this . . . . day of . . . .

Before me,

A. B.

Notice of motion calling on a husband to advance a certain sum of money to his wife to enable her to bring an action for separation "a mensâ et thoro" against him, and for maintenance "pendente lite."

In the Supreme Court of the Colony of the Cape of Good Hope.

Between A.B. (born . . . .), wife of C.D.,
Applicant,
and the said C.D.,
Respondent.

Sir,—Be pleased to take notice that application will be made to the Honourable the Supreme Court on . . . . the . . . . day of . . . ., at 10 o'clock in the forenoon, or so soon thereafter as counsel can be heard, on behalf of the above applicant, at which time you will be required to shew cause, if any, why you shall not be ordered forthwith to pay over to the said applicant a certain sum of money to be fixed at the discretion of the Court, sufficient to enable her to institute proceedings against you for a judicial separation *a mensâ et thoro*, by reason of your continued unkindness, cruelty, and abusive, violent, and offensive conduct towards her. And also why you shall not be ordered to pay a certain sum, from time to time, by way of alimony, to enable her to maintain herself, according to her station in life, *pendente lite;* and to shew cause also why you shall not be ordered to pay the costs of this application.

Dated at Cape Town, this . . . . day of . . . .

Yours, &c.

. . . . . .

Applicant's Attorney.

To C.D., of . . . ., the above Respondent.

Affidavit in support of the foregoing notice.

In the Supreme Court of the Colony of the Cape of Good Hope.

Between A.B. (born . . . .), wife of C.D., Applicant.
and
The said C.D., Respondent.

I, A.B., of . . . ., the above applicant, make oath and say :—

1. That I was on the . . . . day of . . . . married to the said C.D., then a bachelor, at . . . ., in . . ., without having previously entered into any marriage settlement, or antenuptial contract.

2. That after the said marriage I lived and cohabited with him at . . . ., and that he and I have had issue of the said marriage . . . . children, to wit : . . . . sons and . . . . daughters.

3. That I was at the day of my said marriage possessed of a certain estate called . . . ., and situate in the county of . . . ., and that the rents and profits from the said estate yielded an annual income of £ . . . . sterling.

4. That my said husband is one of the partners of the firm of . . . . in . . . ., and is also a partner of the firm of . . . ., in Cape Town.

5. That he has hitherto derived from the several partnership concerns aforesaid an annual income of about £ . . . . sterling.

6. That he is possessed also of . . . . shares in the . . . . Railway Company, ... shares in the . . . . Bank, ... shares in the . . . . Insurance Company, all of which yield a clear annual dividend of £ . . . . sterling.

7. That from the day of my said marriage with said respondent he and I lived very happily together, until about the month of . . . ., when my said husband commenced, and has to the present time continued, treating me with great unkindness and cruelty, that he frequently in a violent and offensive manner abused me, violently assaulted me, and more particularly on one occasion, viz.: on the . . . . day of . . . ., he did beat me with a stick on divers part of my body, and did also spit in my face.

8. That by reason of the cruelties aforesaid, I have on divers occasions been compelled to leave his house and seek the protection of friends in the neighbourhood, but I have been induced to return to cohabitation with him by his solemn promise that he would treat me kindly for the future; that about a week after I had so returned as aforesaid, my husband again commenced treating me with unkindness, spoke rudely and offensively to me in the presence of servants and others in the house, also swore at me, and used a great many vulgar and foul expressions towards me, because his dinner was not cooked to his liking, a fact which was not true, and even if true, it was not in my power to have avoided; he also pulled me by the hair, spat in my face, and kicked me off my chair, that in consequence of my said husband violating his promises and continuing to treat me with unkindness and cruelty, and also of the assault, I was compelled to seek the interposition of the law, and that accordingly my said husband was on the . . . . day of . . . . taken before the magistrate of . . . ., and was by the said magistrate fined the sum of £ . . . . sterling, and bound over to keep the peace towards me and all His Majesty's subjects for the term of six months.

9. That I am too much alarmed to return to and cohabit with my said husband, and by reason of the premises cannot safely live and cohabit with him.

10. That therefore I intend to institute an action against my said husband for judicial separation "*a mensâ et thoro*" by reason of the cruelties, &c., aforesaid.

11. And, lastly, that I am not possessed of any money or other means wherewith to carry on my said action, nor to maintain myself *pendente lite.*

(Signed) A.B.

Sworn at . . . ., this . . . . day of . . . .

Before me,

. . . . . .

J.P.

Notice of Taxation.

In the Supreme Court.

Between . . . . . Plaintiff,
and
. . . . . Defendant.

Sir,—Take notice that I shall attend before the taxing officer of this Honourable Court on the . . . . instant, at eleven o'clock in the forenoon, for the purpose of having the annexed bill of costs in the above cause taxed.

Dated at Cape Town, this . . . . day of . . . ., 19—.

Yours, &c.,

. . . . . .
Plaintiff's Attorney.

To . . . . . ., Esq.,
Defendant's Attorney.

Notice of Motion for a review of the taxing officer's taxation.

In the Supreme Court of the Colony of the Cape of Good Hope.

Between A.B., Plaintiff,
and
C.D., Defendant.

Sir,—Take notice the Honourable the Supreme Court will be moved on the . . . . day of . . . ., 19—, at 10 o'clock in the forenoon, or so soon thereafter as counsel can be heard on behalf of the above defendant, at which time you will be required to shew cause, if any, why the taxation by the taxing officer of this Honourable Court of the plaintiff's bill of costs in the above cause shall not be reviewed as to the items hereinafter mentioned, viz. :—

1st. Paid expenses of witnesses			E.F., ...	£ . . . . .
Do.	do.	do.	G.H., ...	£ . . . . .
Do.	do.	do.	I.J., ...	£ . . . . .

And why the taxing officer's taxation thereof shall not be set aside and wholly disallowed, on the ground that the evidence of the said witnesses was not material to any of the issues in the said cause.

2nd. As to the items following, viz. :—

Attending two days' inspection of property in dispute	£30 0 0
Cart and horse-hire with coachman at inspection . .	15 0 0

Why the taxing officer's taxation thereof shall not be reduced on the ground that the charges are excessive for the nature and amount of the work done.

3rd. As to the items following :—

Paid Mr. . . . . ., the chemist, for chemical experiments made by him to prepare himself for the trial £50 0 0

Paid Mr. . . . . ., for examining the wool-washing establishment and the machinery, for the purpose of giving evidence in the case 100 0 0

Why the taxing officer's taxation thereof shall not be disallowed, on the ground that their evidence in no way assisted the Court at the trial, and that the charges, if claimable, are of right charges between attorney and client and not between party and party; and, lastly, to shew cause why you shall not be ordered to pay the costs of this application.

Dated at Cape Town, this . . . . day of . . . .

Yours, &c.

. . . . . .

Defendant's Attorney.

To . . . . . ., Esq.,
Plaintiff's Attorney.

Affidavit to accompany preceding notice.

In the Supreme Court of the Colony of the Cape of Good Hope.

Between A. B.,
Plaintiff,
and C. D.,
Defendant.

I, ... of Cape Town, attorney for the above defendant, make oath and say :—

That I duly attended before the taxing officer of this Honourable Court on the taxation by him of the plaintiff's bill of costs in this cause, and that I did also duly represent to him my objections to the several items specified in the notice of motion to review his taxation, and I also assigned the grounds of my objections, which are the same as those mentioned in the notice of motion, yet nevertheless the taxing officer disregarded my objections, and taxed the said bill as it now stands.

(Signed) . . . . . .

Sworn at Cape Town, this . . . . day of . . . . 19—.

Before me,

. . . . . .
J. P.

Summons against your client for costs.

(Heading.)

GREETING :

Command A.B., of . . . ., that justly and without delay he render and pay to . . . . of . . . . . ., attorney-at-law, the sum of £ . . . . sterling of lawful money, which he owes to and unjustly detains from him, being the amount of a certain bill of costs and charges of the said . . . ., duly taxed by the taxing officer of the Supreme Court on the . . . . day

of . . . ., for the work and labour by him done and performed, and professional services rendered, and the care, diligence, and attendance by him bestowed as the attorney of and for the said A.B., and at his special instance and request, and for fees and disbursement due and of right payable to him in respect thereof in and about a certain suit for (*here state cause of action, for instance*) recovery of damages by reason of certain alleged slanderous words, and wherein the said A.B. was the plaintiff (or defendant) and one E.F. was the defendant (or plaintiff), and which said action (*here state what became of it so as to show your client's liability, for instance*) was withdrawn by the said plaintiff, and he thus became liable for the costs incurred therein; as it is said; and unless he shall do so, then summon the said A.B., that he appear before our Justices of our Supreme Court of our said Colony, at Cape Town, on the . . . . day of . . . . 19—, at ten o'clock in the forenoon, to shew wherefore he hath not done it; and also to acknowledge or deny his signature affixed to the said power of attorney to sue in the said cause or the qualification of the said C.D., or the validity of the said debt.

And also summon the said A.B., then and there to plead to the provisional claim of the said . . . ., for payment thereof, under security, with costs; to join issue thereon. And serve on the said A.B. a copy of the summons, and of the said bill of costs, and power to sue whereon the said provisional claim is founded; and return you then there this summons, with whatsoever you have done thereupon.

Witness, &c.

. . . . . .

. . . . . .
Registrar of the Supreme Court.

. . . . . .
Plaintiff's Attorneys, De Lettre Chambers, Church-square, Cape Town.

Writ for costs only.

(Heading.)

GREETING:

We command you, that of the goods and chattels of A.B., of . . . ., you cause to be made the sum of £ . . . sterling, being the taxed costs and charges incurred by C.D., of . . . ., in and about a suit wherein he was the defendant (or plaintiff), and the said A.B. was the plaintiff (or defendant), and which said costs the said A.B. is by sentence of the Supreme Court of our said Colony, bearing date the . . . . day of . . . ., condemned to pay, as appears to us of record, and have that money before the Justices of our said Court at Cape Town, on the . . . . day of . . . ., to be rendered to the said C.D.

And have there this writ, &c.

Witness, &c.

. . . . . .

. . . . . .
Registrar of the Supreme Court.

Van Zyl & Buissinné.
Plaintiff's Attorneys, De Lettre Chambers, Church-square, Cape Town.

CHAPTER XLV.

RULES AND SCALE OF FEES AND CHARGES TO BE OBSERVED IN THE COURTS OF THIS COLONY, WITH NOTES AND THE DECISIONS OF THE SUPREME COURT THEREON.

GOVERNMENT NOTICE.—No. 3, 1878.

Colonial Secretary's Office, Cape Town,
3rd January, 1878.

His Excellency the Governor, with the advice of the Executive Council, has been pleased to approve of the following Rules for regulating the practice of the *Supreme Court, Eastern Districts Court, Circuit Courts, and Courts of Resident Magistrate,* and to direct the publication thereof under Section 3 of Act No. 15 of 1867.

J. C. MOLTENO, Colonial Secretary.

In the Supreme Court
of the Cape of Good Hope

I. IT IS ORDERED:—

In the taxation of costs the taxing masters of the Colony *shall be guided, so far as the circumstances of each particular case will permit,* by the following scale of fees and charges to be taken and made by Attorneys, and certain other officers respectively of the *Supreme Court, Eastern Districts Court, and Circuit Courts.*[1]

[1] This tariff is not in force in the High Court of Griqualand West, where by a local arrangement (not by a Rule of Court), but recognised by that Court, they have a more liberal scale.

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
1.—*Writs.*						
Summonses—Drawing and engrossing—per brief sheet[1]	0	3	4	0	6	8
Summonses—Fair copy (one half)						
„ Each copy for service (one half)						
NOTE.—In special cases the cost of drawing summons by one counsel to be allowed between party and party.[2]						
Subpœnas—Drawing and fair copy :—						
„ Ordinary subpœna ... ... each	0	5	0	0	5	0
„ Duces tecum ... ... „	0	5	0	0	7	6
„ Copy for service (one half)						
Writ of execution and fair copy	0	5	0	0	5	0
„ attachment and fair copy	0	7	6	0	10	0
2.—*Instructions.*						
Instructions to sue or defend; to move for commission *de bene esse;* for special affidavits (where allowed); for petition; or to counsel in any necessary matters	0	3	4	0	6	8
Instructions for Declaration	0	6	8	0	13	4
„ „ Replication or other pleading ...	0	6	8	0	6	8
„ „ Brief on Exceptions	0	3	4	0	6	8
„ „ „ „ Trial[3]	0	6	8	0	6	8
If difficult, and many witnesses or documents, discretionary but not to exceed	.	.	.	0	13	4
If difficult, and many Motions	0	3	4	0	3	4
„ „ „ Appeals[4]	0	3	4	0	6	8
„ to set down cause for trial; to sheriff or agent as to serving any process (including attendance); and any other simple instructions (where allowed)	0	3	4	0	3	4

[1] In the case of *Swartz* vs. *Landmark* (pp. 858–861) upon a review of the plaintiff's bill of costs (17th August, 1882, not reported), the taxing officer, Mr. Crosby, had disallowed 3*s.* 4*d.* for briefing the summons to counsel, but the Court restored the item. The Chief Justice said :—"He thought it quite right that a summons should be briefed to counsel, because although it was a much simpler document than it used to be, counsel should know on what the action originated."

[2] In the case of *Dean and Hartley* vs. *The Colonial Government* (p. 852) the Court on a review of the plaintiff's bill of costs (17th August, 1882, not reported) supported the taxing officer's disallowance of a fee to counsel in drafting summons on the ground that it was not proved that it was a *special* case, and also that the case was not of such a difficult and intricate nature as to warrant the necessity of counsel drafting the summons.

[3] See remarks in "Model Bill" (*infra*) in the case of *Combrink* vs. *Fick* (p. 858), under items "Instructions for Brief on Trial" and "Minuting evidence," allowed. But briefing opinion of counsel not allowed; see *Swartz* vs. *Landmark* (pp. 858–861).

[4] The charge for "*perusing and considering the record*" in an appeal case was for the first time fixed by the Supreme Court in the case of *Ohlson* vs. *De Beer Mining Board* (pp. 833, 875) (31st August, 1882, not reported) at the rate of 6*d.* per brief sheet, but in no case to be less than 10*s.* 6*d.*

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
3.—*Drawing Pleadings, &c.*[1]						
Drawing instructions for declaration, plea, replication or other pleading, at per brief sheet ...	0	6	8	0	6	8
Fair copy (one half), and engrossing (one half)						
Drawing bill of costs and fair copy, for first side of 30 lines	0	5	0	0	5	0
For every additional side	0	2	6	0	2	6
Copy with appointment to tax (one half)						
Consent paper to close pleadings and fair copy[2] ...	0	5	0	0	5	0
Admission paper, per brief sheet	0	6	8	0	6	8
4.—*Notices.*						
Drawing any ordinary notice such as, filing declaration, notices of trial, notice to bar pleading, notice demanding plea, caveat, &c.[3] ...	0	5	0	0	5	0
Copy for service and serving	0	2	6	0	2	6
Notice to produce or avail and copy, per folio ...	0	2	6	0	2	6
Copy for service and serving (one half)						
5.—*Letters (no charge allowed for fair copy).*						
Letter of demand before action (only one allowed)[4]	0	5	0	0	5	0
If more than one side of 2 folios, for each additional side	0	1	6	0	2	6
Copy for the Court (one half)						
„ transmitting any document for service ...	0	5	0	0	5	0
„ to local agent stating result of case ...	0	5	0	0	5	0
„ transmitting fees to local agent or sheriff ...	0	5	0	0	5	0

[1] By Rule of Court 375, "every pleading of less than ten folios of seventy-two words each *may* be either printed or written, and every other pleading . . . . shall be printed."

[2] This item is abolished by § 3 of the Rules of Court of March, 1879.

[3] Notice of filing any pleading, when a defendant has entered appearance, is abolished by the 6th rule (h) of the Rules of March, 1880. The rest are still in force.

[4] In the case of *Swarts* vs. *Landmark* (quoted above), the Court said "they were not prepared to lay down a general rule that a letter of demand should not be briefed to counsel, but this should only be under special circumstances." In the case of *Dean and Hartley* vs. *Colonial Government* (quoted above), the Court held that all charges before issuing of summons, excepting the letter of demand, are costs between attorney and client, and not costs between party and party. But since 1894 the taxing officer, Mr. Tennant, has gradually extended the interpretation of this rule, and the Court has approved of it, by allowing for correspondence, before issue of summons, *if material and necessarily occasioned, according to the circumstances of each case.*

6.—*Attendances.*

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
Attending on receipt of any letter, or reply ...	0	3	4	0	3	4
" to serve any affidavit	0	3	4	0	3	4
" to sue out any summons and file warrant	0	3	4	0	3	4
" to sue out any other process	0	3	4	0	3	4
" to file any pleading or notice	0	3	4	0	3	4
" to set down cause for trial	0	3	4	0	3	4
" to record judgment[1]	0	3	4	0	3	4
" to search for any return or appearance	0	3	4	0	3	4
" on receipt of notice of appearance or produce any documents	0	3	4	0	3	4
" on counsel with brief, or for signature, or to fix conference	0	3	4	0	3	4
" on receipt of counsel's draft of any pleading	0	3	4	0	3	4
" on receipt of notice of filing any pleading and perusing[2]	0	3	4	0	6	8
" on receipt of advice on evidence and perusing	0	3	4	0	6	8
" on defendant and perusing letter of demand; or summons served on him[3]	0	3	4	0	6	8
" conferring with client on special pleas; on exceptions; or on claim in re-convention	0	6	8	0	6	8
" on any witness—minuting evidence[4] ...	0	6	8	0	6	8
" " " settling with him ...	0	3	4	0	3	4
" on witnesses and client to fix conference	0	3	4	0	6	8
" at conference	0	6	8	0	10	6

[1] The object of this item under the old practice was that in case of an intricate or an involved Order, it was the duty of the attorney to see that the Court's Order was correctly and clearly recorded while the matter was fresh in every one's memory, so as to avoid an interpretation of the Order at a later date. In later times this item was allowed in every case, however trivial, because of the item "Paid recording," which was introduced for revenue purposes. The item is no longer allowed, and the fee paid for recording is repealed by Act 20, 1884.

[2] The notice of filing any pleading is abolished by the 6th rule (h) of March, 1880; the rest of the item remains good.

[3] With reference to *perusing* documents, the Court in the case of *Swartz* vs. *Landmark* (pp. 858–861) allowed the following charges:—

"Perusing and considering the Will of . . . . in the original Dutch."

And allowed also the charge for "briefing" the Dutch document, and held that in future the charges for "*perusing*" and "*briefing*" Dutch documents should be allowed as between party and party, though there are translations of them. In the case of *Treasurer of the Colony* vs. *Bosman* (pp. 868, 869) the item for translating a Dutch Placaat has been allowed. (See also Chapter "*Costs*.")

[4] Minuting evidence allowed, but not "Observations" or "Arguments" on the case by the attorney. (See *Combrink* vs. *Fick* (p. 858).)

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
Attending in court :—						
1. Case on roll but not called ...	0	10	6	0	13	4
2. „ called but not concluded or judgment deferred :—						
(a). If trial case and witnesses examined[1] ...	1	1	0	2	2	0
(b). If argument only ...	0	13	4	1	1	0
(c). If postponed, absence of material witness ...	0	13	4	0	13	4
3. Judgment given	0	13	4	1	1	0
„ at taxation	0	3	4	0	6	8
Ditto per hour	0	6	8	0	6	8
„ arranging and examining documentary evidence for counsel to advise on evidence	0	6	8	0	6	8
„ looking out and arranging documents called for, per brief sheet[2]	0	3	4	0	3	4
„ at any inspection in land or water case, including travelling, per day[3] ...	2	2	0	2	2	0
„ „ „ „ part of a day	1	1	0	1	1	0

7.—*Briefs.*

Drawing Brief—original matter, per brief sheet ...	0	6	8	0	6	8
All other	0	3	4	0	3	4
Short brief	0	5	0	0	5	0
Brief to note judgment[4]	0	5	0	0	5	0

[1] An attorney employed to *conduct the proceedings in an insolvent estate* charged or his *attendance* one guinea for the first and a guinea each for the two others. The taxing officer, Mr. Crosby, had allowed a guinea for the first attendance, but struck off half a guinea of the charges made for the other two. The taxing officer said he allowed a guinea for the first attendance, as it had occupied some time, but as the other two were not so long, he considered half a guinea each sufficient. The Chief Justice said the Court might fairly remit this matter to the taxing officer for reconsideration, at the same time throwing out a suggestion that a charge of two guineas for the first attendance would not have been excessive. The fact of only charging one guinea for the first day may have induced the attorney to make a lower charge for the two subsequent days. He thought the charge ought to stand. (*Re Est. Hugo*, decided 14th July, 1883, not reported.)

[2] In the case of the *Wine Growers Association* vs. *Glaeser* (12th September, 1886, not reported), the Supreme Court held this item is a mistake and cannot be acted upon, but that a fair charge for time taken should be allowed in taxation.

[3] For surveys and plans see the cases of *Heynes, Mathew & Co.* vs. *Cape Town Council; De Villiers* vs. *Cape Divisional Council; Turnbull and others* vs. *Janson;* and *O'Shea* vs. *The Town Council of Port Elizabeth.* (*Supra* in Chapter "*Costs.*")

[4] Allowed to both counsel who were necessarily engaged in the case; see the cases of *Edmeades* vs. *Mostert*, and *Edmeades* vs. *Scheepers*, in 1882, and *Heydenrych* vs. *Kingon*, in 1889 (pp. 861-863 and 863-865).

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
8.—*Affidavits and Petitions.*[1]						
Drawing any Petition or Affidavit, including fair copy, per folio	0	2	6	0	2	6
Copy for service, or any other necessary copy per folio	0	1	0	0	1	0
(But not to be less than 5*s.* for affidavit and copy.)						

NOTE I.—A brief sheet shall contain at least 288 words; a folio shall contain at least 72 words.

NOTE II.—In order to diminish as much as possible the costs arising from the copying of documents to accompany the briefs of counsel, the masters are to allow only the copying of such documents or such parts of documents as they may consider necessary for the instruction of counsel or for use at the trial.

9.—*Bill of Costs in Provisional Cases.*

Attending on receipt of letter, enclosing papers, and perusing	0	3	4
Letter in reply and postage[2]...	0	5	4
Paid for protest			
Attending plaintiff, and taking instructions to sue ...	0	3	4
Drawing and engrossing warrant	0	3	4
Attending to bespeak translation, and afterwards for the same	0	3	4
Paid for same and stamps			
Paid stamp and filing warrant	0	3	6
Drawing and engrossing summons	5*s.* to 0	10	0
Attending to sue out and pay charges	0	3	4
Paid stamp and signing			
Each copy summons to serve (one half)			
Each copy promissory note or bill of exchange or I.O.U.	0	1	0
Copy of any other document, per folio	0	1	0
Copy summons to keep (one half)			
Attending to sue out and leave same with the sheriff, and instructions	0	3	4
Paid sheriff registering[3]	0	1	0
Paid postage of summons to deputy sheriff[2]	0	2	0
Attending to search for return and pay charges	0	3	4
Paid for return and postage			
Attending to set down cause and pay charges	0	3	4
Paid	0	3	0
Instruction for counsel, and short brief	0	5	0

[1] Instructions allowed for special affidavits.
[2] Whatever the postage may be, as it has since then been considerably reduced.
[3] This item has been repealed by Act 20 of 1884, Sched. I.

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
Fee to advocate[1]				1	1	0
Attending therewith and thereon				0	3	4
Attending Court, defendant condemned				0	10	6
Attending at the Registrar's office to record judgment and pay charges[2]				0	3	4
Paid[3]						
Drawing and engrossing writ of execution				0	5	0
Paid stamp and signing						
Attending to sue out and leave same with the Sheriff and instructions				0	3	4
Bill of costs, copy and taxation				0	7	6
Attending on settlement and granting receipt				0	3	4
Paid the Master[4]				0	1	0
Paid registration on writ[5]				0	1	0
Paid postage on writ[6]...				0	1	4

Costs of proceedings for final order of sequestration, civil imprisonment or revival of judgment to be charged according to the scale provided for provisional cases.

10.—*Notarial Charges.*

Attending at the Bank to present note or bill and noting answer				0	6	8
Notice to maker or drawer and endorsers, if residing in town, each				0	3	4
Paid cab hire						
Letter to maker or drawer and endorsers, if not residing in town, each[7]				0	5	4

[1] This is the only fee to an advocate that is fixed by the Court; all other fees to counsel are discretionary. In the case of *The Beaufort West Municipality* vs. *Wernich* (p. 865) (31st August, 1882, not reported), the Supreme Court held "that it would not interfere with the decision of the taxing officer with respect to counsel's fees unless some grave mistake had been committed." So also did they decide in the case of *Spengler* vs. *Sea Point Municipality* (decided July, 1883, not reported (pp. 866–868)). But in provisional sentence cases, if unopposed, the fee of counsel is fixed at one guinea. If opposed, then the costs of opposition, as well as counsel's fees, are as on Motions. And if witnesses are called and give evidence, then the costs and counsel's fees are as in Trial cases.

But where no fee is marked on the brief for counsel, and as to counsel's fees generally, see, *infra*, the cases of *Edmeades* vs. *Mostert*; *Edmeades* vs. *Scheepers*; *Heydenrych* vs. *Kingon*; *Beaufort West Municipality* vs. *Wernich*; *Roux* vs. *Roux*; *Spengler* vs. *The Sea Point Municipality*; *Treasurer-General* vs. *Bosman*; *Walker* vs. *Liquidators Cape Central Railway*; *Logan* vs. *Colonial Government*; and *Teengs* vs. *Garlick*.

[2] See note "a" under heading "6—Attendances" (*supra*).

[3] This is repealed by Act 20 of 1884.

[4] Now the taxing officer, and the fee is no more 1*s.*, but 1*s.* in the £ for each £ or fraction of a £ taxed. (Act 20 of 1884. Fees of Office III.)

[5] This item is repealed by Act 20 of 1884, Sched. I.

[6] Whatever it may be, as the postage has since been considerably reduced.

[7] The 4*d.* mentioned here was for postage, now reduced.

	COMMON CASES. £ s. d.	SPECIAL CASES. £ s. d.
Copy to keep	...	0 1 0
Copy each letter to annex to protest if necessary...	...	0 1 0
Protest in duplicate	...	1 1 0
Paid stamps		
Certificate of presentation in duplicate	...	0 15 0
Paid stamps		
[If the parties are out of the postal route and personal presentation is necessary, then in addition to usual charges here mentioned the Notary is entitled to charge for reasonable travelling expenses, horse hire, &c., &c.]		

11.—*Cost on Writ of Arrest.*

Attending upon plaintiff, conferring with him as to arresting defendant and taking instructions to arrest him	...	0 6 8
[If the instructions came through a local agent instead of this item the following is allowed: "*attending on receipt of letter of instruction from local agent and perusing*"]	...	0 6 8
Drawing power to arrest	...	0 3 4
Paid stamp and filing		
Instruction for affidavit	...	0 6 8
Drawing same and fair copy, 2*s.* 6*d.* per folio		
Attending to be sworn	...	0 3 4
Paid stamp		
[If further affidavits are necessary then charge upon the same principle as for the affidavit here mentioned].		
Drawing writ of arrest and fair copy, 7*s.* 6*d.* to 10*s.* Copy for any necessary purpose (one-half)		
Attending to issue writ and file power and other papers and exhibit taxed bill	...	0 3 4
Paid stamp and signing		
Paid filing affidavit		
Attending to leave writ with the Sheriff with instructions	...	0 3 4
Paid registration[1]	...	0 1 0
Paid caption fee (in addition to this fee the Sheriff's Officer is entitled to any extra expenses he has been put to, owing to the difficulty in finding the defendant or the distance he is away if out of the municipality from the place where it was thought he was, for instance, boat hire or cab or cart hire to pursue defendant).		

[1] This item has been repealed by Act 29 of 1884, Sched. I.

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
Bill of cost and copy		...		0	5	0
Attending taxation		...		0	3	4
Paid Master's taxation fee 4 per cent.[1]						
If the attorney was employed by local agent then this item is also allowed:—letter to local agent informing him of result and postage[2]		...		0	5	4
12.—*Miscellaneous.*						
Warrants to sue, defend, or arrest	0	3	4	0	3	4
Serving any notice	0	3	4	0	3	4
[If the notice is served at a distance of more than a mile from the attorney's place of business, then the necessary expenses of the person serving the same shall be allowed, but not to exceed the amount which would be payable to the messenger of the Resident Magistrate's Court for serving a summons in a civil case.]						
Letters, papers, messages, &c., discretionary.						
To Judge's clerk for notes of evidence, per folio[3] ...	0	1	6	0	1	6
Drawing security bond and fair copy in appeals to Privy Council	1	1	0	1	1	0
Drawing insolvent schedules, including petition, affidavit, and all attendances	0	10	6	5	5	0
Interpreter's fee when other than court interpreter employed, per hour	0	7	6	0	7	6
But not to exceed, per diem	2	2	0	2	2	0
Commissioner's fee for taking evidence *de bene esse* or under commission in insolvency, per hour...	1	1	0	1	1	0
But not to exceed, per diem	3	3	0	5	5	0
Fee of arbitrator appointed by the court, per diem[4]	3	3	0	7	7	0
Attorney's fee for attendance before arbitrator or commissioner, per diem...	2	2	0	2	2	0

NOTE.—No case shall be treated as special unless it is one of peculiar difficulty and unless the amount recovered, accepted or agreed to be paid exceeds the sum of £25.

[1] Now the taxing officer. The fee (which, however, goes to the Crown) is now 1*s.* in the £ for each £ or fraction of a £ taxed. (Act 20 of 1884. Fees of Office III.)

[2] The 4*d.* for postage has since been reduced.

[3] This has lapsed, as the Judges' notes are now filed of record with each case. See § 13 of Act 5, 1879.)

[4] In the case of *The Treasurer-General of the Colony* vs. *Nicholls* (decided 23rd October, 1883, not reported) the Court reduced the arbitrator's fees claimed. The following is a summary of what took place in the Supreme Court:—

Mr. Innes (now Sir James) appeared on behalf of Mr. T. Holland, one of the arbitrators, for a review of the taxation of the taxing officer, who had reduced the

II. IT IS FURTHER ORDERED:—

The Rules of Court promulgated on the 8th of January, 1877, are hereby repealed, and in lieu thereof the following rules are substituted:—

The following fees shall hereafter be taken by the officers of the Court of Resident Magistrate.[1]

A.—By the Clerk.

1. For every summons two pence in the pound upon the amount of the demand, but the fee is in no case to exceed the sum of three shillings and four pence.

2. For every hearing two pence in the pound upon the amount of the demand, but the fee in no case to exceed 3*s.* 4*d.*

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arbitrators' fees by £134 6*s.*, and had disallowed £9 9*s.* charged for travelling expenses, and £1 13*s.* 6*d.* charged for postage and transmission of telegrams. The question in dispute was a very complicated matter of account, and the arbitration lasted over a number of days, the examinations being held at King Williams Town and East London.

The Chief Justice said the so-called arbitrators were mere referees for the purpose of going through the accounts. An arbitrator's decision would have been final.

Mr. Innes said there were two other referees, Messrs. Stewart and Henderson, but he was not aware whether they were disposed to abide by this as a test case. Gentlemen who were good accountants and were appointed as referees generally made very high charges for their services.

Mr. Justice Dwyer said they should make their agreements beforehand. He did not see any very complicated accounts; many of them were alleged overcharges or short delivery of stores.

The Chief Justice said the Court would be very loth to refer cases to arbitrators if the expenses were to be allowed to run up to such an extent as was contended for by the applicant, and he should have thought that £120 would have been a fair remuneration for the arbitrators, or rather referees. As the fact that the Government had telegraphed to applicant that he was appointed arbitrator did not affect the Order of the Court, he was a mere referee, and had not the responsibility which attached to an arbitrator. He must express his regret that the Government of the Colony did not think it worth while to appear before the Court by counsel and state what it desired. It was a strange way of proceeding to leave the Court to decide upon the matter. At the present stage the Court did not know what the wishes of the Government really were, and as far as it (the Court) was concerned, it did not think the decision of the taxing officer should be interfered with.

Mr. Justice Dwyer concurred, and said that instead of the matter being a complicated one, it seemed to him to be simply a question of account.

Mr. Innes said that the Government intended to be represented by counsel, but through some mistake the brief, which was to have been taken up by Mr. Upington, in the absence of the Attorney-General, had not been delivered.

[1] The fees and charges in force in the *Magistrate's* Court under these Rules are in force also in the Province of Griqualand West (Act 2 of 1889). But the attorneys practising in the High Court of that province have a different tariff to that of the Supreme and Eastern Districts Courts.

3. In all cases where a defendant shall, either personally or by an attorney or agent, confess judgment or admit the claim of the plaintiff in Court, and in all cases by default where provisional judgment shall be given upon any liquid document, the fee for hearing under clause 2 to be reduced one-half.

4. For every warrant for the execution of a judgment of the Court, whether against movables, for civil imprisonment, or otherwise, three pence in the pound upon the amount for which such warrant, attachment, or execution issues.

5. In every case where the fee cannot be estimated by any rule in this tariff, it shall be estimated on fifteen pounds.

6. All fractions of a pound for the purpose of calculating fees under this Schedule shall be treated as an entire pound.

7. No increase of fees shall be made by reason of there being more than one plaintiff or defendant.

8. For signing every original summons for a witness, one shilling.

9. Noting an appeal, one shilling.

10. Copying and certifying proceedings in appeal, or any other record or document, sixpence per sheet containing one hundred words.

11. Taxation of costs, three pence in a pound on the amount of costs allowed.

12. In any case where the summons or other process shall be prepared by the clerk of the Court, and not by an attorney or agent, the same fees and charges shall be payable to the clerk on behalf of Government as are provided to be allowed to enrolled agents for the preparation of such process.

B.—By the Messenger.

1. Service of any summons within three miles of the court-house, 2*s.* 6*d.*

2. Service of any summons beyond three miles of the court-house, 4*s.* 6*d.*

a. Where the distance to be travelled going and returning is greater than one day's distance, then the fee of 4*s.* 6*d.* for service shall be payable for every day's or fraction of a day's distance necessarily travelled.

3. When the messenger repairs to the house of a defendant with warrant of execution, and then and there demands and receives payment of the judgment debt and costs, the same charges shall be made as for serving a summons at the same place.

4. Making and signing any inventory of movables attached in execution, 1*s.* Copy, 6*d.*

5. Making out and signing notice of such attachment, 2*s.*

6. Taking security for production of the movables attached, 1*s.*

7. Affixing notice of sale in execution, 6*d.*

8. When the defendant does not pay the judgment upon demand of messenger, but pays the same to the messenger before sale, then, for

paying plaintiff, 2 per cent. Should the messenger, before receiving payment as aforesaid, have taken any of the steps hereinbefore mentioned under numbers 4, 5, 6, and 7, then the percentage aforesaid will be payable in addition to the fees earned by the step or steps so taken.

9. Upon the amount of all sums realized by the sale in execution of defendant's movables, not exceeding the amount of the judgment debt and costs, 5 per cent.

a. Upon a return of *nulla bonâ* the charge shall be the same as if the warrant had been a summons.

10. For arresting any person and lodging him in prison in pursuance of any decree of civil imprisonment, 7*s.* 6*d.*

11. Executing any warrant for putting any party in possession of premises, 5*s.*

12. Executing any order for seizing and arresting movable property in security for rent in arrear, when the same is not ultimately sold, 5*s.*

13. Making and signing inventory of such property and notice of seizure, same charges as above under 4 and 5.

14. Taking security for the production of movable property arrested under any such order as aforesaid, 1*s.*

15. Affixing notices of any sale of movable property attached in security for rent, and sold by consent, 6*d.*

a. When any movables arrested under any such order as is in the 27th section of the Act No. 20 of 1856 mentioned shall be afterwards sold, either in execution of a judgment for the rent in regard to which they were attached or under any order made by consent under the provisions of the 32nd section of the said Act, the fee of 5*s.* for executing the order for arrest shall not be allowed.

b. When the place for executing any warrant or order mentioned, or referred to in the foregoing tariff, shall be more than 6 miles from the place of holding the Court of the Resident Magistrate, then the daily allowance to the messenger shall be the same as if such warrant or order were a summons of the said Court.

NOTE.—The above charges for service of any process include the return to be made thereupon to the Court in respect to which return no additional charge is to be made.

C.—Horse-hire of Messenger.

1. As often as any summons, warrant, or order shall be served or executed at any place not farther than 3 miles from the court-house no horse-hire shall be allowed to the messenger.

2. When the place to which the messenger repairs for any such purpose as aforesaid is 3 miles, but not more than 6 miles from the place where the Court is held, then for horse-hire 4*s.* 6*d.*

3. When the place to which the messenger repairs for any such purpose as aforesaid is more than 6 miles from the court-house, then for horse-hire 8*s*,

4. For the purpose of this tariff a day's journey shall be taken to be 36 miles, and as often as the place to which the messenger shall repair for any such purpose as aforesaid shall be at such a distance from the court-house that more than 36 miles must be travelled in going and returning, then the messenger shall be entitled for every day's journey, and for every fraction of a day's journey, to horse-hire at the rate of 8*s*. per day. Provided that in any case in which more horses than one shall be absolutely necessary for the purpose of serving or executing any process, 16*s*. per day may be allowed.

5. When two or more summonses for defendant or witnesses, whether at the instance of the same plaintiff or of different plaintiffs, shall have been, or in the judgment of the magistrate ought to have been, served by one and the same journey, the charge for horse-hire for performing the round of services shall be fairly and equitably apportioned amongst the several cases, regard being had to the distances at which the parties summoned respectively reside from the place of holding the Court; but the fee for service shall be payable for every service made, precisely as if there had been none other.

III. It is further ordered:—

In lieu of the fees and charges fixed by Act No. 20 of 1856 the following shall be the scale of fees and charges to be taken and made by attorneys and enrolled agents for or on account of the work and labour by them expended in and about or in connection with the prosecuting or defending of any civil action or proceeding in any Court of Resident Magistrate.[1]

A.—Plaintiff's Attorney or Agent.

Fees and charges according to the following scale or tariff shall (as often as the plaintiff shall be allowed costs) be due and payable by the defendant to the attorney or enrolled agent of the plaintiff; that is to say:

1. For demand made by letter before summons, in addition to necessary postage, 1*s*. 6*d*. Copy of such demand, 1*s*. 6*d*.

a. Every demand of any debt or sum of money shall specify a day on or before which the defendant shall be at liberty to pay or satisfy the demand to the agent.

b. Every such demand shall also inform the defendant that if the sum demanded shall be paid or satisfied on or before the day specified, together with the sum of 3*s*. for the said demand and copy thereof, and

[1] In the case of *Marks* vs. *Esterhuysen* (3 J., 38) the Supreme Court decided that a *person cannot claim the costs in a case as well as a commission for collection.*

As to the discretion of a taxing officer as to the taxation of costs between attorney and client, see the case of *Spengler* vs. *The Municipality of Sea Point* (pp. 866–868).

the necessary postage, in addition, no further proceedings will be taken in the case.[1]

c. Such demand may be made by letter sent through the post-office prepaid and properly directed; and the day to be specified as aforesaid in the demand shall be fixed upon the presumption that the demand will come to the hands of the defendant upon the next day after the day upon which, according to the course of post the letter containing such demand will reach the post-office from which it is to be delivered.

d. No demand which shall not in substance conform to the three preceding rules or clauses shall be capable of being charged for against the defendant.

2. For every authority to sue filed in court, 1*s.* This fee shall only be payable in case the authority shall after the day specified in the demand, and before any tender of payment of debts and costs made by the defendant, have been filed with the clerk of the Court.

3. For every original summons against any defendant prepared by the attorney or agent, 2*s.* 6*d.* in liquid, and 3*s.* 6*d.* in illiquid cases.

4. For every copy of such summons made by the attorney or agent for service, 1*s.* in liquid, and 1*s.* 6*d.* in illiquid cases. The fee for the summons and the fee for the copy of the summons shall, respectively, include the allowance for the copy of any document which, by the 10th Rule of the Courts of the Resident Magistrates, it shall be necessary to serve upon the defendant together with the summons; with this exception, however, that if any such document, not being a bill of exchange, "promissory note," or "good-for," shall be of such length as reasonably to require that it shall be paid for, then the Resident Magistrate may, when or after giving judgment, allow for any such copy any sum not exceeding 6*d.* per folio of 72 words or fraction thereof.

5. As often as the defendant shall, after summons issued and before the day of hearing, seek to settle the case by paying debt and costs, then there shall be included in the costs necessary to be paid or tendered, as a fee for giving notice to the clerk of the Court of the withdrawal of the case, 1*s.* 6*d.*

6. For every original summons requiring the attendance of witnesses, 1*s.*

7. For every copy for service of any such last-mentioned summons, 1*s.*

8. For conducting the case in Court at the hearing thereof:—

a. No fee shall be allowed as against a defendant for conducting any case whatever, where the defendant shall have confessed judgment not later than on the day before the day appointed for the hearing of such case.

[1] In the case of *Lesar* vs. *Morrison* (1 J., 30) the Supreme Court held this item did not alter the common law, and that where the defendant complied with the demand before the issue of the summons he was not bound to pay the costs of demand. See also *Redelinghuys and Wessels* vs. *Jones, Cosnett and Ball*, 3 J., 250; *Hepworth* vs. *Dunkley*, 3 J., 400; and *Jones* vs. *Cauvin & Co.*, 8 J., 217.

b. When any defendant shall on the day of hearing confess judgment, or consent to judgment when called upon to plead to the summons, there shall be allowed in taxation as against such defendant the sum of 5*s.*

c. In uncontested cases, in which judgment is claimed upon a liquid document, the sum of three shillings and sixpence, and in illiquid cases (7*s.* 6*d.*).

d. In all contested cases, whether the claim be liquid or illiquid, without reference to the amount in question, the sum of ten shillings and sixpence (10*s.* 6*d.*).

e. If the plaintiff's claim be both liquid and illiquid the agent shall be entitled to the fee fixed for illiquid cases.

f. If the defendant pleads compensation or makes counter-claim, the attorney or agent shall be entitled to the fee fixed for contested cases.

g. When on the day appointed for the hearing, the case shall by consent of both parties or by the direction of the Resident Magistrate be postponed until some future day, without being heard in part, no fee shall be allowed in respect of the appearance of the attorney or agent in Court.

h. When the case shall be postponed, without being heard in part at the instance of the defendant, without the consent of the plaintiff, the Resident Magistrate shall, unless cause to the contrary shall be shown by the defendant, allow the attorney or agent as a fee for his attendance one-half of the fee allowed in contested cases.

i. Rules or Clauses *g* and *h* shall also apply to second or subsequent postponements; but for every day or part of a day on which such contested case shall be actually heard the attorney or agent shall be entitled to a fee of 10*s.* 6*d.*

9. In regard to judgments merely provisional in their nature, as in the 28th Rule of the Courts of Resident Magistrates mentioned, then, for every bond given for security *de restituendo*, 1*s.* 6*d.*

10. For every warrant of execution against movables, and every *alias* of such warrant, 1*s.* 6*d.*

11. For every summons for civil imprisonment of the defendant, 2*s.*

12. Copy of such summons for service, 1*s.*

The fees aforesaid having reference to a decree of civil imprisonment, shall not be claimable or recoverable from the defendant against whom such decree shall have been granted, and a warrant for the execution thereof shall be issued, except in the particular case contemplated and provided for by the 22nd Section of Act No. 20, 1856, that is to say, the case in which the non-payment by the defendant of the debt and costs due by him is vexatious; and in this particular case, but in none other, the Resident Magistrate may allow to the attorney or agent, as against the defendant, a fee of 7*s.* 6*d.* for conducting in Court the claim for such decree, should it appear to such Magistrate just and fitting so to do.

13. For making out and attending the taxation of any bill of costs, 1*s.* 6*d.*

14. For the transmission of any warrant of execution against the movable property of the defendant to any district other than that in which the judgment was given, in addition to necessary postage, 2*s.*

B.—Defendant's Attorney or Agent.

Fees and charges according to the following scale or tariff shall, as often as the defendant shall be allowed his costs, be due and payable by the plaintiff to the attorney or enrolled agent of the defendant.

1. For every authority to defend filed in court, 1*s.*

2. For every original summons requiring the attendance of witness, 1*s.*

3. For every copy for service of any such last-mentioned summons, 1*s.*

4. For conducting the case in Court at the hearing thereof, 10*s.* 6*d.*

a. The Rules or Clauses *g* to *i* appended to Section 8 of the fees of the plaintiff's attorney or agent, shall apply to the fees of the defendant's attorney or agent in like manner as therein set forth, in regard to the plaintiff's attorney or agent.

b. The fee aforesaid for conducting the case in Court shall include the framing by the attorney or agent of all the pleas pleaded and counter-claims made for and on behalf of the defendant.

5. For making out and attending the taxation of any bill of costs, 1*s.* 6*d.*

6. For every warrant of execution against the plaintiff for costs adjudged to the defendant, and for every *alias* warrant for such costs, 1*s.* 6*d.*

Should it become necessary to sue for a decree of civil imprisonment for the recovery of such costs, then the attorney or agent of the original defendant shall be in the same condition in regard to his costs as if he were the attorney or agent of a plaintiff seeking a decree of civil imprisonment against a defendant for a like sum.

C.—Miscellaneous Fees and Charges of Attorneys or Enrolled Agents.

1. For framing interrogatories under Section 52 of Act No. 20 of 1856, 3*s.* 9*d.*

2. For framing cross interrogatories, 3*s.* 9*d.*

a. The last preceding charges shall be payable indifferently to the attorneys or agents for either party.

b. No fee or charge shall be payable to the attorney or agent of the other party for perusing or otherwise assisting to settle the interrogatories, whether direct or cross framed by the attorney or agent of the party who proposes to transmit the same.

3. For drawing every affidavit of rent in arrear for the purpose mentioned in the 26th Section of Act No. 20, 1856, 2*s.* 6*d.*

4. For drawing every security bond entered into under the said Section, 2*s.*

5. For drawing every magistrate's order for attachment of property granted under the said Section, 2*s.*

6. For drawing every magistrate's order for sale by consent, of the defendant's movables under Section 32 of Act No. 20, 1856, 2*s.*

(*a.*) In case any person whose movables shall have been attached for rent in arrear shall consent to an immediate sale thereof, as is in the 32nd Section of Act No. 20, 1856, provided, the attorney or agent of the party who shall have applied for such attachment shall not, as against the person so consenting, be entitled to any fee or charge for or in reference to such consent or any subsequent proceedings, other than the foregoing.

7. For every notice to produce any document in possession of the opposite party, and copy of such notice including service, 2*s.* 6*d.*

IV. It is further ordered :—

In lieu of the tariff fixed by the Rules of Court promulgated on the 8th January, 1877, the allowances for *personal attendance and travelling expenses payable to witnesses in civil cases, in the Supreme Court, Eastern Districts Court, Circuit Court, and Courts of Resident Magistrate* shall be calculated as nearly as possible according to the following scale :—([1].)

1. Witnesses shall be paid for their attendance at the following rates per diem, over and above their travelling expenses, as hereinafter mentioned, that is to say :—

(*a.*) Physicians, surgeons, advocates, attorneys, government land surveyors, civil engineers, architects, public notaries and conveyancers residing within 10 miles of the court-house, 10*s.* 6*d.* to £1 1*s.*, and beyond that distance £1 1*s.* to £2 2*s.*

(*b.*) Ministers of the gospel, members of either House of Parliament, heads of departments in the public service, resident magistrates, justices of the peace, field-cornets, municipal commissioners, town councillors, divisional councillors, importing merchants, bank managers, and commissioned officers in the army and navy, residing within 10 miles of the court-house 7*s.* 6*d.* to 15*s.*, and beyond that distance 10*s.* 6*d* to £1 11*s.* 6*d.*

(*c.*) Enrolled agents, master mariners, mates, master tradesmen, agriculturists, holders of the wholesale licence for the sale of merchandise, and holders of the licence for apothecaries, chemists, druggists, and

[1] See also previous chapter under heading "*Expenses of Witnesses.*"
In the case of *Heynes, Mathew & Co.* vs. *The Town Council* (decided in 1883, not reported, p. 796) the Supreme Court held, on review of the taxation of the costs, that *any agreement to pay a witness for his evidence, more than what he would be entitled to under this tariff, is contrary to public policy and cannot be enforced.* And so also did the same Court hold in the case of *Knox* vs. *Koch*, 2 J., 382. In this latter case the Chief Justice, *inter alia*, said, ". . . . we have to do . . . . with certain general principles of law. One of these principles is that the *Court will not enforce a contract which in the opinion of the Court is clearly against public policy*, and it seems to me that if ever there was a contract against public policy it is one between a witness and a party to the suit, that the witness should receive a greater remuneration than the law allowed him to give evidence."

auctioneers residing within 10 miles of the court-house, 10*s.*, and beyond that distance 7*s.* 6*d.* to 15*s.*

(*d.*) Clerks to persons holding the wholesale licence for the sale of merchandise or for the sale of wines and spirits, clerks in the public service, and clerks of municipalities, of divisional councils and of joint-stock companies, professors of music, and comedians or actors residing within 10 miles of the court-house, 4*s.*, and beyond that distance 6*s.* to 12*s.* 6*d.*

(*e.*) Holders of retail shop licences, or licences for selling wines and spirits by retail, non-commissioned officers in the army or navy, or persons above the rank of privates in any police force, residing within 10 miles of the court-house, 3*s.* 6*d.*, and beyond that distance 5*s.* to 10*s.*

(*f.*) Journeymen tradesmen, assistants to persons holding any retail licence or any licence as an apothecary, chemist and druggist, residing within 10 miles of the court-house, 3*s.*, and beyond that distance 4*s.* to 8*s.*

(*g.*) All persons not previously enumerated, residing within 10 miles of the court-house, 2*s.*, and beyond that distance 3*s.* to 6*s.*

2. The foregoing fees for attendance shall be payable in respect of every day necessarily occupied in travelling to, remaining at, and returning from the Court.

3. In the case of witnesses who do not travel to the Court upon horseback, or by vehicle, a day's journey shall be taken to be 18 miles.

4. As often as the same witness shall come under more heads than one of the foregoing classification he shall be paid according to that head, to which is attached the highest rate.

5. No witness shall be considered a master tradesman for the purpose of this tariff unless he shall have not fewer than two journeymen in his employment.

6. Females who come under any of the foregoing heads of classification shall be paid like males.

7. No witnesses resident within 3 miles of the court-house shall be entitled to travelling expenses.

8. Every witness resident at a greater distance than 3 miles, but not more than 6 miles, from the court-house to which he is summoned, shall, in case he shall have travelled to the court-house on horseback or by vehicle, be allowed for travelling expenses a sum not exceeding 10*s.*

9. When the residence of the witness shall be more than 6 miles, but not more than 18 miles from the court-house, then he shall be allowed for travelling expenses a sum not exceeding 15*s.*

10. For the purpose of this tariff a day's journey on horseback or by vehicle shall be taken to be 36 miles, and as often as the residence of the witness shall be at such a distance from the court-house that more than 36 miles must be travelled in going and returning, then the witness shall be entitled to for every day's journey, and for every fraction of a day's journey, travelling expenses at a rate not exceeding 25*s.* a day. Provided that no witness shall be entitled to demand any larger sum for travelling expenses than he shall have reasonably and actually expended. Provided further that in case a witness could have travelled by sea, by railway train, or by any other public conveyance at less expense than by

a private conveyance he will only be allowed to charge for the travelling expenses which would be incurred in thus travelling by sea, by railway train, or by such public conveyance, and for the time which would be so occupied, unless it be proved by the affidavit of a duly qualified medical practitioner that travelling by sea, by railway train, or by a public conveyance would have been injurious to the health of the witness.

11. No witness except a witness who shall have travelled to the Court on horseback or by vehicle shall be allowed travelling expenses, such expenses being included in the attendance fee hereinbefore provided.

12. The charges for witnesses as fixed by this tariff are to be considered as payable to the witness by the party who summoned or produced him, and in the event of such party being awarded his costs against any other party, the said charges shall be allowed against such other party in the taxation of costs.[1]

13. In the taxation of costs between party and party no amount shall be allowed for any witness, whether for attendance or travelling expenses, unless there shall be produced to the taxing officer proof that such amount had already been paid or tendered to such witness.

14. In the taxation of costs between party and party, nothing shall be allowed for any witness not examined, unless upon proof that his evidence might reasonably have been believed to be material and necessary.[2] But no witness not examined and not summoned shall be allowed for in the taxation of costs between party and party.

15. If a number of witnesses manifestly greater than was reasonably necessary shall have been summoned by any party, there shall only be allowed against the other party the charges for such witnesses as were reasonably necessary.[3]

16. In the taxation of costs between party and party no amount shall be allowed for any witness in respect of personal attendance or travelling expenses, if the fact or facts which such witness is summoned to prove shall, before the issue of such summons, have been admitted to the party taking out the summons by the opposite party, provided that such admission shall be in writing signed by the party making it or his lawful attorney or enrolled agent as the case may be.

17. When the same person shall be a witness in more cases than one

[1] In the case of *Steenkamp and another* vs. *De Villiers and others* (3 C.T., 104), the Chief Justice said, "It was safer for a litigant to subpœna his witnesses . . . . but he would not lay down a rule that in no case was a witness entitled to his expenses because not subpœnaed. If the taxing officer was satisfied that the witness *bonâ fide* attended the Court to give evidence, he was justified in allowing him his expenses."

[2] In the case of *Hofmeyr* vs. *Clear* (1 J., 232), the Court held that where a witness had been called to prove a fact but was not examined, and he was a material and necessary witness, his expenses should be allowed.

[3] Thus, in the case of *Meintjes* vs. *des Vages* the plaintiff had subpœnaed nine witnesses, but the Court held three sufficient for the purpose of this case and disallowed the expenses of the rest as between party and party (2 J., 11); and so also in the case of *Berger* vs. *Equitable Assurance Company* (quoted in the previous chapter), where seventeen witnesses were actually examined and it was prayed that the expenses of twelve others should be allowed.

heard on the same day he shall be entitled to no more than one fee for personal attendance and one allowance for travelling expenses, which shall be equally divided between such cases.

By order of the Court,

J. C. B. SERRURIER, Registrar.

By virtue of the 1st Section of Act No. 12 of 1886 (to compel the attendance of witnesses before the Courts of Neighbouring States, &c.), the Governor has approved of the following Tariff of allowances to such witnesses over and above their expenses of conveyance.[1]

	£	s.	d.
(*a.*) Physicians, surgeons, advocates, attorneys, Government land surveyors, civil engineers, public notaries, and conveyancers	3	0	0
(*b.*) Ministers of the gospel, members of the Legislature, heads of departments in the public service, commissioned officers in the army and navy, commissioned permanent officers of defensive forces, architects, importing merchants, bank managers	2	10	0
(*c.*) Divisional councillors, municipal councillors, farmers, auctioneers, enrolled agents, apothecaries, master mariners, mates, master tradesmen, accountants, brokers, clerks in the public service, inspectors and sub-inspectors of police, general dealers, licensed dealers in wines and spirits, secretaries of divisional councils and municipalities...	2	0	0
(*d.*) Any person not previously enumerated whose station in life is, in the judgment of the Resident Magistrate who endorses the subpœna, superior to that of the persons mentioned in paragraph (*e*)...	1	10	0
(*e.*) Labourers and others of a similar station in life	0	10	0

In connection with such witnesses the Governor has adopted the 2nd, 3rd, 5th, 6th, 10th, 11th and 17th Sections of Order IV. of our Supreme Court Tariff (*supra*).

MEMORANDUM.

The subjoined *Specimen Model Bills of Costs*, framed by myself, are in no sense complete regarding all professional charges, but are an honest attempt to represent the outlines or general principles of the practical operation of the preceding scale of fees and charges of January, 1878. The young student, by bearing in mind the principles of law and practice

[1] See Tennant's Rules of Court, 4th Ed., p. 270.

laid down in the preceding and in this Chapter, will have no difficulty to make out a Bill of Costs which he could honestly defend before the taxing officer, or to tax the Bills of Costs of others. Until he can do both he does not understand, and had better again study the principles of the Law of Costs and of Taxation of Costs.

It will be seen from the first Order of Court of 1878 (*supra*) that the taxing officer is not literally bound to every item, but "*shall be guided so far as the circumstances of each particular case will permit.*" In the usual run of cases the Tariff is adhered to, but in cases of intricacy, or difficulty, or magnitude, the taxing officer is allowed to expand, as it were, his discretion "*according to the circumstances of each particular case*" and the work actually and necessarily done, and to make a more liberal allowance in his taxation.

Thus in instances where my notes shew this discretion to have been exercised by the T. O., it was, as stated, in case of intricacy, difficulty, or magnitude, beyond the usual run of cases, and if, therefore, the attorney wishes to claim such extra charges and allowances, he must satisfy the T. O. of the justness and reasonableness of his claim.

The point always to be borne in mind is to *charge only for work actually, bonâ fide, and necessarily done;* and though such charges may sometimes not be claimable as between party and party in a Court, yet the attorney must be able to substantiate such charges either as between party and party or as between attorney and client as having been necessarily incurred according to the exigencies and circumstances of each particular case.

The costs mentioned in these Model Bills are between party and party. It is impossible to fix a tariff to meet costs between attorney and client *in every case*, but such costs must *as far as possible be upon the same principle.* The attorney is entitled to claim a fair and reasonable allowance for actual time engaged with his client or any of his witnesses beyond the usual period, and for all work done which cannot properly be charged between party and party, and which may be necessary to the client's case, or which may have been done at the request or by the instructions of the client; and for perusing and examining a great many documents, correspondence or books or accounts, in order to find out which may be necessary or requisite for the case, to be used at the trial.

It is of frequent occurrence that the client is unable to assist his attorney in the getting up, or in the defence of, his case, by which the latter is put to greater trouble and labour. The charges for such extra labour and time necessarily occupied on the client's behalf, though perhaps necessary to the cause, are not always chargeable as between party and party, but as between attorney and client.

The question of costs is often of more importance in legal proceedings than might at first sight appear, not because of the client's proverbial impression that the only thing sure in law is costs, but for the attorney's own reputation. It is really on the question of the taxation of Bills of Costs that most of the questions on costs arise, and it is therefore in the hope of rendering the young practitioner some assistance in one of the

most disagreeable duties of his profession, that I have framed these model bills and have added a few notes thereto, as well as on the preceding official tariff, with the Supreme Court decisions on costs. Many cases are cited in this as well as in the preceding chapter as "not reported." This means officially. I can, however, vouch for their accuracy, as I have been engaged in most of them for one side or the other, while in others I was present at their hearing and took notes thereof at the time of the particulars of each application and of the judgments. In some instances the newspapers of the day have not only correctly but also fully reported the decisions of the Court, which I have copied.

SPECIMEN MODEL BILLS OF COSTS

REFERRED TO IN THE ABOVE MEMORANDUM, WITH THE DECISIONS OF THE SUPREME COURT THEREON, AND WITH NOTES.

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
Instructions to make a written demand[1]	0	3	4	0	3	4
Writing letter of demand[2]	0	5	0	0	5	0
(If more than one side of 2 folios, for every additional side)	0	1	6	0	2	6
Paid postage.						
Copy of letter of demand for the Court	Half of original.					
Attending on receipt of reply	0	3	4	0	3	4
For writing every additional letter in answer to defendants or plaintiffs or his attorneys.[3]						
Copy to keep of such additional letter that may be requisite to be used in the cause (half of the original).						
Attending on receipt of and perusing every letter that may be requisite and used at the trial ...	0	3	4	0	3	4
(Except as to next item.)						
Attending on Defendant and perusing letter of demand	0	3	4	0	6	8
(If before a letter can be answered it is necessary that the client should be consulted on it, then this additional charge is allowed.)						
Attending client with letter from . . . . consulting him thereon and taking his instructions for a reply	0	3	4	0	6	8
Instructions to sue	0	3	4	0	6	8
Drawing and engrossing warrant	0	3	4	0	3	4

[1] See remarks in *Swartz* vs. *Landmark* (*infra*).
[2] *Ibid.*
[3] Same principle as on letter of demand.

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
Drawing summons, at per brief sheet	0	3	4	0	6	8
Fair copy	Half of original.					
Every copy of summons for service	ditto.					
In an important case whenever necessary that Counsel should settle the summons, then after the item "Instructions to sue," &c., the following items shall stand as costs between party and party, viz. :—						
Drawing instructions, at per brief sheet	0	6	8	0	6	8
Fair copy for Counsel to settle[1]	Half of original.					

[1] As to brief and fee to counsel for *drafting summons*, the following is an epitome of what took place in the Supreme Court on the 17th August, 1882, in the case of *Dean and Hartley* vs. *The Colonial Government* (not reported).

Mr. Upington (afterwards Sir Thomas) said that the chief item objected to was the expunging of a fee to counsel for drafting summons. The taxing official (Mr. Crosby) appeared to have come to the conclusion that under the circumstances there was no necessity for the summons being drafted by counsel, and he accordingly expunged the fee of a guinea and a half, together with two sums of 3*s.* 4*d.* for the attorneys sending the case to counsel. . . . .

The Chief Justice said in the case of *De Villiers* vs. *Cape Divisional Council*, in which this question was raised, the Court decided the charge ought to be allowed, but subsequently the new tariff for bills of costs was promulgated, by which it was settled that the summons ought to be in the simplest form possible. Were these cases of such a difficult and intricate nature that an attorney could not be trusted? . . . .

Mr. Upington would not pledge himself to say that in any case, because he knew there were gentlemen in the other branch of the profession who were competent to draw up very intricate summonses. . . . .

The Attorney-General said he thought that the allowance or disallowance of such items should be left to the discretion of the taxing officer. . . . .

The Chief Justice said it was well known that in most cases which came before the Court there were certain costs which the losing side was called upon to pay, but under certain special circumstances the Court ordered the unsuccessful party to pay all costs, as sometimes a vexatious action was brought or a vexatious defence set up. There was something to be said on both sides . . . . It was only after carefully weighing the evidence that the Court was able to decide, and in those cases it would be unfair to adjudge the unsuccessful party to pay all expenses of both sides. . . . .

The question for the Court now to decide was whether the taxing officer had the right to strike off the costs between party and party, and in this he considered the taxing officer was quite right.

As to the *matter of Counsel drafting summonses*, he had already called attention to the case of *De Villiers* vs. *Cape Divisional Council*. In the new bill of costs, framed by the Court, the very first item was the charge for engrossing per brief sheet 3*s.* 4*d.*, and in special cases 6*s.* 8*d.* But was this a special case? He had put the question to Mr. Upington, but he was not prepared to say. As no proof had been brought that it was a special case the taxing officer was quite right in his decision, and he must have the support of the Court. The remaining items were charges before summons was issued. The taxing officer had only followed the practice of this Court from time immemorial, and that of the English Courts also in disallowing them. The attorney was entitled to be paid, but his own client must pay him. The taxing officer's decision must be supported with costs.

[Since this decision the Court has approved of the taxing officer's discretion in allowing all costs necessarily incurred before issue of summons.]

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
Short brief to accompany	0	5	0	0	5	0
Paid his fee.[1]						
Attending thereon	0	3	4	0	3	4
Attending on receipt of summons as settled and perusing same, &c.	0	3	4	0	3	4
Engrossing same as settled, at per B. S.	0	3	4	0	3	4
(N.B.—These items shall be only for one brief and fee to one Counsel.)						
Attending at Registrar's to issue summons and file warrant	0	3	4	0	3	4
Paid stamps thereon.						
Every copy of summons for service (half of charge for original).						
Attending at Sheriff's Office with instructions for service	0	3	4	0	3	4
Attending at Sheriff's Office to search for return to summons and to pay charges	0	3	4	0	3	4
Paid Sheriff's expenses.						
Attending at Registrar's Office to search for appearance of defendant. (Allowed only if the appearance is not entered within the time prescribed by the Rules of Court)	0	3	4	0	3	4
Attending upon receipt of notice of defendant's appearance	0	3	4	0	3	4
Instructions for declaration[2]	0	6	8	0	13	4
Drawing same, at per brief sheet	0	6	8	0	6	8
Fair copy for Counsel...	Half of original.					
Paid Mr. Advocate—fee.[3]						
Short brief to accompany	0	5	0	0	5	0
Attending thereon	0	3	4	0	3	4
Copy brief to Junior Counsel—the same as the fair copy to Senior Counsel.[4]						
Paid Mr. Advocate—fee—Junior Counsel.						

[1] As to not marking counsel's fee on brief see the cases of *Edmeades* vs. *Mostert*, and *Edmeades* vs. *Scheepers* (pp. 861–863).

[2] On special occasions, in cases involving intricacy, more has been allowed by the taxing officer.

[3] On the subject of counsel's fees generally see, *infra*, the cases of *Edmeades* vs. *Mostert*; *Edmeades* vs. *Scheepers*; *Walker* vs. *Liquidators Cape Central Railways*; *Logan* vs. *Colonial Government*; *Teengs* vs. *Garlick*; *Beaufort West Municipality* vs. *Wernich*; *Spengler* vs. *Sea Point Municipality*; *Roux* vs. *Roux*; and *The Treasurer-General of the Colony* vs. *Bosman*.

[4] As a general rule the taxing officer does not allow, as between party and party, the charges for copy, brief, and fee to junior counsel for *drawing any pleading*. He allows it only when the case is of any intricacy. After the close of the pleadings the fee for a second counsel is allowed as between party and party, except in the most ordinary simple cases. No brief and fee for a third counsel is ever allowed as between party and party.

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
Short brief to accompany	0	5	0	0	5	0
Attending thereon	0	3	4	0	3	4
Attending upon receipt of and perusing and considering declaration as drafted by Counsel[1] ...	0	3	4	0	3	4
Engrossing declaration, at per brief sheet[2] ...	0	3	4	0	3	4
Attending each Counsel for his signature	0	3	4	0	3	4
Attending at Registrar's Office to file declaration	0	3	4	0	3	4
Paid stamps and filing.						
Copy declaration for service, at per brief sheet ...	0	3	4	0	3	4
Copy declaration to be annexed to affidavit of service when declaration is *filed for default*, at per brief sheet	0	3	4	0	3	4
Service thereof on defendant's Attorney	0	3	4	0	3	4
Affidavit of service (when necessary)	0	5	0	0	5	0
Attending to be sworn	0	3	4	0	3	4
Paid stamp.						
Drawing notice of filing declaration for *default of appearance* and which notice at same time contains notice of trial[3]	0	5	0	0	5	0
Copy for service	(Half of original)					
Attending to serve	0	3	4	0	3	4
Drawing affidavit of service and fair copy at 2*s.* 6*d.* per folio but not to be less than	0	5	0	0	5	0
Attending to be sworn	0	3	4	0	3	4
Paid stamp.						
Letter transmitting notice and declaration to be served on defendant (when in default) ...	0	5	0	0	5	0
Paid postage.						
(Or else, "Attending Sheriff with instructions to serve"	0	3	4	0	3	4)
Attending upon receipt of reply and perusing and examining return of service	0	3	4	0	3	4
Letter transmitting local agent's charges for service of declaration and notice	0	5	0	0	5	0

[1] Sometimes 6*s.* 8*d.* is allowed by the taxing officer if the pleading is either unusually long or intricate.

[2] If the declaration contains 10 folios of 72 words each it must be printed, then the following items are chargeable in addition :—

	£	s.	d.	£	s.	d.
Attending printers with copy declaration with instructions to have it printed ...	0	3	4	0	3	4
Attending thereafter on receipt of proof sheets and perusing and correcting same at 6*d.* per brief sheet						
Attending printers, settling their account ...	0	3	4	0	3	4
Paid them						

[3] Under this heading 10*s.* is sometimes allowed by the taxing officer.

	COMMON CASES. £	s.	d.	SPECIAL CASES. £	s.	d.
Paid postage.						
(Or else, "Attending on receipt of Sheriff's return"	0	3	4	0	3	4)
Paid local agent's charges for service.						
Perusing and considering each annexure to declaration	0	3	4	0	6	8
Copy for service of every document annexed to a declaration, at per brief sheet	0	3	4	0	3	4
Copy for service of every other document scheduled at the foot of the declaration and of which notice of avail has been given, and when used at the trial, at per brief sheet	0	3	4	0	3	4
Attending on receipt of defendant's application for time to plead	0	3	4	0	3	4
Writing letter and granting same till . . . . day of	0	5	0	0	5	0
Drawing notice demanding plea	0	5	0	0	5	0
Copy for service and serving	0	2	6	0	2	6
Affidavit of service and fair copy at 2*s.* 6*d.* per folio but not less than	0	5	0	0	5	0
Attending to be sworn	0	3	4	0	3	4
Paid stamp.						
If in default no notice of trial had been given at the same time with notice of filing declaration, then draw notice demanding plea	0	5	0	0	5	0
Copy for service and serving	0	2	6	0	2	6
Affidavit of service and fair copy at 2*s.* 6*d.* per folio but not less than	0	5	0	0	5	0
Paid stamp.						
Attending to be sworn	0	3	4	0	3	4
Attending upon receipt of and perusing and considering plea served[1]	0	6	8	0	6	8
Perusing and considering annexures thereto (discretionary, but sometimes)[2]	0	3	4	0	3	4
Attending client, conferring on special pleas and claim in reconvention (if any)	0	6	8	0	6	8
Instruction for replication	0	6	8	0	6	8
Drawing same, at per brief sheet	0	6	8	0	6	8
Fair copy		(The half)				
Paid Mr. Advocate—fee—Senior Counsel.						
Short brief to accompany	0	5	0	0	5	0
Attending thereon	0	3	4	0	3	4
Copy brief for Junior Counsel the same as for the fair copy of Senior Counsel.						

[1] If plea is unusually long, sometimes 13*s.* 4*d.* is allowed.

[2] If special, *e.g.*, also pleas to claim in reconvention, more is allowed, 6*s.* 8*d.* to 13*s.* 4*d.*

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
Paid Mr. Advocate—fee—Junior Counsel.						
Short brief to accompany	0	5	0	0	5	0
Attending thereon	0	3	4	0	3	4
Attending upon receipt of and perusing and considering plaintiff's replication as drafted by Counsel[1]	0	3	4	0	3	4
Engrossing same—charges upon same scale as for declarations—Attending Counsel for his signature—Attending at Registrar's Office to file—Copies of replication and documents annexed—Service, printing, &c., and all further pleadings, notices, attendances, copies of documents, &c.—on the same scale as the declaration and pleadings, &c.						
Instruction for advice on evidence and arranging and examining documentary evidence (if any) for Counsel to advise on evidence	0	6	8	0	6	8
Paid Mr. Advocate—fee—Senior Counsel.						
Short brief to accompany to advise on evidence ...	0	5	0	0	5	0
Attending thereon	0	3	4	0	3	4
Paid Mr. Advocate—fee—Junior Counsel.[2]						
Short brief to accompany	0	5	0	0	5	0
Attending thereon	0	3	4	0	3	4
Attending on receipt of and perusing and considering advice on evidence	0	3	4	0	6	8
Copy of advice for guidance and information of local agent at 1*s.* per folio.[3]						
Letter forwarding same to him and requesting his attendance thereto	0	5	0	0	5	0
Paid postage.						
Attending upon his receipt of reply[4]	0	3	4	0	3	4
Attending upon receipt of list of names of the Plaintiff's witnesses with instructions for subpœnaing	0	3	4	0	6	8
Instructions to set down cause for trial	0	3	4	0	3	4
Notice of trial to the Registrar and fair copy ...	0	5	0	0	5	0
Attending to file same and to set down cause ...	0	3	4	0	3	4
Paid setting down.						
Notice of trial to defendant's Attorneys	0	5	0	0	5	0
Copy for service and serving...	0	2	6	0	2	6

[1] If long and elaborate a higher fee is sometimes allowed.

[2] From this stage the taxing officer allows the fees of junior counsel as between party and party, but never for more than one junior counsel.

[3] See remarks in the case of *Swarts* vs. *Landmark* (*infra*).

[4] In case any plans or surveys are necessary, see the cases of *Heynes, Mathew & Co.* vs. *Cape Town Council*, and *De Villiers* vs. *Cape Divisional Council*, *supra*, in Chapter "*Costs.*"

	COMMON CASES. £ s. d.	SPECIAL CASES. £ s. d.
Similar charges for the notice to be served on the defendant when in default.		
Drawing subpœna and fair copy (ordinary) ...	0 5 0	0 5 0
For every copy to serve	Half of original.	
Attending to sue out	0 3 4	0 3 4
Paid stamp and signing.		
(Similar charges for all further subpœnas.)		
Instructions to Sheriff or agent as to service ...	0 3 4	0 3 4
(Or, writing to local Attorney or agent with instructions for service	0 5 0	0 5 0)
Paid postage.		
Attending upon receipt of his reply and examining his return of service, &c....	0 3 4	0 6 8
Paid for his service (as per tariff for High Sheriff—see Rule of Court 341).		
Letter transmitting his fee	0 5 0	0 5 0
Paid postage.		
Paid conduct money, on service of subpœnas according to distances, and what would in each particular instance be reasonable, but this item is afterwards to be included in the expenses allowed to witnesses.		
Drawing subpœna *duces tecum* and fair copy ...	0 5 0	0 7 6
For each copy to serve	Half of original.	
Attend to sue out	0 3 4	0 3 4
Paid stamp and signing.		
Similar charges for all further subpœnas *duces tecum.*		
Notice to produce, at per folio and fair copy ...	0 2 6	0 2 6
Copy for service and serving	The half.	
Service thereof if in Cape Town	0 3 4	0 3 4
(N.B.—One notice only to produce is allowed, but if in consequence of documents of which the defendant has given notice to avail it becomes necessary to serve a further notice to produce, then the same is allowed also.)		
Notice to avail same charges as notice to produce.		
Attending on receipt of notice to produce	0 3 4	0 3 4
Looking out and arranging documents called for (a fuller charge for time taken)[1]	0 3 4	0 3 4
Copies thereof for service if required by opposite attorney, at per brief sheet	0 3 4	0 3 4
Attending on each witness to take his statement and to minute his evidence, at per brief sheet[2]	0 6 8	0 6 8

[1] See the case of *The Wine Growers Association* vs. *Glaeser* (*supra*).
[2] Sometimes more is allowed if the case is intricate or voluminous.

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
Instruction for brief on trial[1]	0	6	8	0	13	4
Drawing same, at per brief sheet	0	6	8	0	6	8
Fair copy thereof and copy pleading and documents in the cause for counsel, at per brief sheet[2]	0	3	4	0	3	4

[1] In the case of *Combrink* vs. *Fick* (decided 12th October, 1883, not reported), the "Minuting" of the evidence was allowed but not the "Observations" or "Arguments" written by the attorney, nor a copy thereof. The following is a brief summary of what took place in Court on the argument of this case :—

The Attorney-General said the issue in this case was whether the attorney in a case had a right to make *comments on the case* at all, and if so whether he could charge for briefing them to counsel. These *summaries*, he submitted, were of great assistance to counsel in placing the facts clearly and succintly before them.

The taxing master, Mr. Crosby, said he had allowed *summaries* in other cases, but he thought the nine brief sheets of argument and observation in this case quite unnecessary. If this were not left to the discretion of the taxing master an attorney might sit down and write a hundred brief sheets of argument.

The Chief Justice : Is there any charge made here for consultation ?

The taxing master said there was.

The Attorney-General contended that this was carrying the system of taxation to an extravagant degree. If such criticism were applied to ordinary cases for work and labour done the Court would pooh-pooh it.

The Chief Justice said it required a strong case to justify the Court in interfering with the discretion which was exercised by the taxing officer. If the applicant in this case wished to have the decision of the taxing officer set aside, it rested upon him to show that a palpable mistake had been made, but this had not been shown by the Attorney-General. He (the Chief Justice) had not been able to read over the instructions carefully, but he had glanced over them, and every passage he had read was pure argument—argument deduced from the statement of witnesses who were to give evidence. No doubt it might be of great assistance to counsel to have all this work done for them by the attorneys, but he thought it would be much better if counsel did the work themselves.

The facts of the case would be far better imprinted on their memories if they made the summaries themselves and deduced the arguments from the evidence submitted to them. He did not think it was at all necessary that the attorneys should furnish them with the arguments to be used. The next thing would be that the attorneys would furnish them with the authorities to quote from.

The object of having counsel was that he might find the arguments which were to be deduced from the facts. In this case it had not been shewn that the taxing master had exercised an unwise discretion. The application must be refused with costs.

[2] The following items disallowed by Mr. Crosby, the taxing officer, were brought under the review of the Supreme Court and allowed by them in the case of *Swarts* vs. *Landmark* (not reported) on the 17th August, 1882, viz. :—

"Brief copy of summons.
"Briefing copy documents sent to country agent.
"Briefing letter of demand.
"Correspondence.
"Briefing of Dutch documents.
"Perusing the documents in the Dutch language.
"Perusal of Annexures to Pleas."

In the same case the following items were disallowed on review as between party and party :—

"Attending on receipt of instructions to take counsel's opinion.
"Briefing of opinion to counsel."

The following is a condensed report of the case, which though not officially, is substantially correct, and appeared in the *Cape Times* of 19th August, 1882 :—

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
Paid Mr. Advocate—fee—Senior Counsel.						
Short brief to accompany	0	5	0	0	5	0
Attending thereon	0	3	4	0	3	4

Mr. Upington (afterwards Sir Thomas) applied to have the taxation of the taxing master in the above case set aside, and argued that if taxation such as that disclosed in the present case were to be allowed by the Court, the effect would be that a successful litigant, instead of having his expenses paid by the party who had failed and because of whom he had been put to the unnecessary expense of appearing in Court, would have to pay the costs out of his own pocket. . . . He would tell the Court that in this case the expenses amounted to £342. Of that amount no less than £250 had been paid for witnesses, while the Attorney-General as counsel only received for his services in connection with the whole case from beginning to end 20 guineas, and Mr. Searle 7 guineas. The attorney's costs amounted to £28, and of this amount nearly £16 had been struck off by the taxing master. If the taxation with regard to the witnesses was allowed, the successful party in this suit would have to pay no less than £148. It was well known that a great amount of labour fell upon an attorney's shoulders in connection with any case, and he would ask whether the balance which the taxing officer wished to allow was a fair remuneration for his time and exertion. . . . He had to deal with the question on its strict legal merits, and he would therefore at once appeal to his Lordship's experience to say whether *copies of summonses, the expense of briefing which* had been struck out by the master, were not necessary for the use of counsel in Court.

Another item cut out had been the cost of *copies of documents sent to country agents*, and the *cost of correspondence connected therewith*—was it to be expected that attorneys were going to do this for nothing? They receive little enough. In one of the large Kimberley appeals, which had cost hundreds of pounds, the Cape Town attorney had only received £4 3*s.* 4*d.* for his trouble in connection with it. The important principle to be borne in mind was, however, on whom should the cost of litigation fall? Surely on the party in the wrong. But the action of the taxing master was putting it on the shoulders of the successful party.

In "Scott on Costs," which the taxing master had kindly lent him, the rule was fairly laid down. In no country were the costs of litigation so small as in this. They were nothing compared to the costs in England. If the Court could only see the bill of costs of a recent appeal heard in the Privy Council it would shew this clearly. He simply asked that their Lordships would look at the matter from the point of view that gentlemen who had spent so much time in their profession and the learning of it should be entitled to some remuneration for their trouble. . . .

Mr. Cole, Q.C., argued that charges such as furnishing parties with copies of pleadings should not be entertained.

Mr. Crosby, the taxing officer, who appeared for himself, said that *summonses* were, under the New Rules of Court, merely *formal documents*, and not now required. The briefing of letters of demand was unnecessary, and correspondence and telegrams were never allowed in England. He had only received notice the day before that his taxation would be brought under review, and he thought it would be better if attorneys told him of their intention earlier, so that he might be able to review his own decision before having the matter brought into Court.

The Chief Justice said that some general remarks had been made by Mr. Upington that the costs in law-suits in this Colony are much lower than those prevailing in England. He thought such remarks were not at all required. The Court must be guided by its own rules and its own practice, and because costs in England are excessive that is no reason why costs here should be so excessive. Certain practices had crept into the Courts in England which this Court did not approve. There was no country in the world where the costs were so excessive as in England, but some of the most eminent judges of the country were doing everything in their power to reduce the costs, and during the last few years they

	COMMON CASES. £ s. d.	SPECIAL CASES. £ s. d.
Fair copy brief for Junior Counsel, same as copy brief for Senior Counsel.		
Paid his fee.		
Short brief to accompany	0 5 0	0 5 0
Attending thereon	0 3 4	0 3 4

had been very greatly reduced, and were now much less than they were twenty-five years ago. In this Colony it was just the reverse, and instead of costs diminishing there was a tendency to increase. This might be attributed to the increase in the cost of living and the diminished value of money. He was not prepared to say, however, that the increase in costs had on the whole been disproportionate to the diminished value of money. Every person, whatever his profession, was entitled to be paid fairly for his work, and where work was well done it should be well paid for. That principle the Court had always kept steadily before its eyes, and had never countenanced the idea that the members of any profession should not be adequately paid; but *no person should be paid for services he did not perform, and no person should pay for services from which he derived no benefit.*

Lawyers' fees were on a different footing from those of other professions—such as medical men and others—as the person who claimed fees only had to do with the one person who employed him. The general principle laid down was this: *that the unsuccessful party should not be asked to pay more costs than was absolutely necessary for the decision of the case*, and if the successful party desired to remunerate his counsel over and above what he could recover from the other side, let him do so, *but the unsuccessful party must not be compelled to pay more than was necessary.* In the present case, looking at the item "*attending on receipt of instructions to take counsel's opinion*," he was surprised to see this claim made, after the strong expressions of opinion given by the Court against such a charge. This should be costs as between attorney and client. In regard to the *briefing of opinion to counsel*, he never knew a case in which the attorney briefed to counsel an opinion he had given himself. Counsel could keep a copy of his opinion, or perhaps find some other person to make a copy for him. Certainly it would not be an unreasonable practice to keep copies.

In regard to *letters of demand*, he was not prepared to lay down a general rule that they should not be briefed to counsel, but this should be only under special circumstances. (Mr. Upington: Notice was given to produce this particular letter of demand by the other side.) There seemed to be no special reason why the letter of demand should be briefed to counsel, and the taxing officer was quite right to refuse to allow it. Regarding copies of documents sent by Cape Town attorneys to defendants in the country, a simple abstract would be much more useful than those documents, and unless it can be shown to be the universal practice, should not be allowed. *On one item* the taxing officer was not quite correct.

He thought it quite right that a *summons should be briefed to counsel*, because although it was a much simpler document than it used to be, counsel should know on what the action originated. In the same manner, in regard to the *Dutch documents* in this case, it appeared counsel was desirous that it should be briefed on to him, as it might be important to him to refer to it in Court. This document he thought should be allowed. In regard to the charge for the *perusal of documents*, as one of them was in the Dutch language he thought the taxing officer should have allowed the charge. He looked upon the whole document as part of the replication itself, being annexures of the replication, and he thought the attorney should be allowed to charge for it. The taxing officer said the attorney had to peruse the document to make a translation of it, but the other side asked for it, and he had to re-peruse it. *On this point he thought the decision of the taxing officer should be set aside.* He thought it would be a very convenient practice if *attorneys who were dissatisfied with the taxing officer's decision* were to call his *attention to the matter*, when he could *reconsider his ruling*, and perhaps

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
Attending on witnesses and client to fix time and place for conference on the brief	0	3	4	0	6	8
Paid Mr. Advocate—fee—Senior Counsel.						
Short brief to accompany	0	5	0	0	5	0
Attending thereon	0	3	4	0	3	4
Paid Mr. Advocate—fee—Junior Counsel.						
Short brief to accompany	0	5	0	0	5	0
Attending thereon	0	3	4	0	3	4
Attending counsel to fix conference (each) ...	0	3	4	0	3	4
Attending conference[1]	0	6	8	0	10	6
Attending on receipt (say, letters) in Dutch and perusing same	0	6	8		...	
Attending translator to have them translated[2] and thereafter for translation, and to pay his charges	0	3	4		...	
Attending Court, case on roll, but not called ...	0	10	6	0	13	4
For every subsequent day (in discretion of taxing officer).						
Attending Court, case ordered to stand over for next term	0	13	4	0	13	4
Letter to local agent informing him thereof ...	0	5	0	0	5	0
Drawing term refresher[3]	0	5	0	0	5	0
Paid Mr. Advocate his fee.[3]						

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the cost of an appeal could be avoided. He did not say that parties were bound to give notice, but he certainly did think it would be a very convenient practice.

As both sides were partially successful, no order would be made as to the costs of the application.

[1] Sometimes more is allowed, according to intricacy of case, number of witnesses, and time reasonably occupied.

[2] As to translations of Dutch documents, or indeed any document in any other language necessarily to be translated into English for the use of the Court, see the cases of *Swartz* vs. *Landmark* (*supra*) and *The Treasurer of the Colony* vs. *Bosman* (pp. 868, 869).

[3] On *refresher* and *not marking fee on brief*, and on *noting judgment*, the following proceedings took place in the Supreme Court in the case of *Edmeades* vs. *Mostert*, and *Edmeades* vs. *Scheepers*, 12th July, 1882, not reported :—

"Mr. Cole appeared on behalf of Messrs. . . . ., defendant's attorneys, to apply for an order calling upon the plaintiff's attorneys to shew cause why certain items in their bill of costs, *viz.*, 12 guineas, 9 guineas, 5 guineas, and 5 guineas paid to counsel, and two items of 5*s.* each, and two of 3*s.* 4*d.* each in connection with payment of refreshers, disallowed by the taxing officer, should not be allowed. The above cases were removed from the Oudtshoorn Circuit Court to this Court for argument, and the local attorneys wrote to Messrs. . . . . to retain Mr. Maasdorp and Mr. Jones. These counsel were briefed, but the attorneys *omitted to endorse the amount of the fees on the briefs before delivering them to counsel.* After the case was over, the ordinary accounts were sent in by the attorneys, of which the above fees formed part, and the taxing officer struck out *counsel's fees because the amounts were not endorsed on the briefs.* Now endorsement on the brief was not a point required by the law. It was purely a piece of etiquette amongst barristers themselves, the original object of the practice doubtless being to remove any suspicion as to the fees depending upon the success

of the case. The taxing officer had nothing to do with this piece of etiquette, all he had to do was to see that the fees had been paid, and in this case counsels' receipts had been produced before him.

"The Chief Justice: If the counsel takes a brief without the fee endorsed upon it he really undertakes to do the work gratis.

"Mr. Cole: I don't think any counsel would be guilty of such a thing—(great laughter)—except in cases of paupers. The learned gentleman proceeded to say that he understood the duty of the taxing officer to be that he should remove any charge that was glaringly improper with or without objection. If nothing of that kind occurred, taxation would depend upon any objection being raised by the other side to any particular item, when the taxing officer acted as arbitrator between the parties. It was to be presumed that each attorney was an honourable man, and that he would watch the costs on the other side on behalf of his client.

"The Chief Justice said that as far as that was concerned, the Court had often commented upon the practice which had crept in, of bills being taxed between the two attorneys. The Court considered it the *duty of the taxing officer not to be bound by any private arrangement between the attorneys;* but to exercise his own functions over every item that was presented to him, whether he was right or wrong in this particular instance.

"Mr. Cole said it must surely be presumed that every attorney would act honestly by his own side. With regard to this case he had been in practice twenty-six years, and he never recollected a case set down for one term and carried over to another term, in which a refresher was not given to counsel. They could not keep all the matters and authorities connected with a case in their heads for six months. The work done in June might have to be done again in December. Then there was an item of 1 guinea—*counsel's fee for noting judgment.* This was not struck out, but a note by the taxing officer was written across it: '*This will not be allowed in future as it is not necessary.*' He would ask the Court whether they wished counsel to be present when judgments were given or not? He had searched his own fee book for twenty years past and could not find an instance in which he had not been paid for attending to note judgment in instances in which judgment had been given at a subsequent period to the hearing of the case. The 'brief to hear judgment, 5*s*.' was a perfectly regular charge.

"The Chief Justice said that when he was at the Bar the invariable practice was for counsel to receive a guinea for *noting judgment* in such cases. In regard to that he would say at once that whatever endorsement the taxing master might make, the Court would not disallow that charge in future, and the attorneys giving the brief for the purpose ought also to be charged.

"The Chief Justice said that when he was at the Bar a meeting was held at which he thought Mr. Cole was present, when certain rules were made which were informally sanctioned by the Judges, and they were then printed, and so long as he was at the Bar those rules were acted upon. He presumed that they were still in existence for the guidance of counsel and attorneys. One of those rules was that no counsel should receive a brief unless the amount was marked on it.

"The taxing officer (Mr. Crosby) being requested to make any statement he desired, said that the cases were commenced in Oudtshoorn and then argued here. In England the practice was only to pay refreshers from term to term when the case had not been commenced. In support of his view he quoted 'Scott on Costs.' The refresher in England was two guineas for a Queen's counsel and one guinea for a junior counsel. He handed in a statement to the Court.

"The Chief Justice said that the case illustrated how necessary it was that the taxing master of the Court should exercise his judgment and discretion in regard to every item coming before him, independently of any agreement or understanding which might exist between the attorneys. Mr. Cole stated the previous day that in this case the plaintiff's attorney did not object to certain items. He confessed when he looked over the items that he was astonished at the statement. The first four items related to instructions to retain counsel, and the payment of counsel's fees. These should not be made charges against the opposite side.

"Mr. Leonard said that he was instructed that these charges had been taken off by the attorneys on the opposite side.

"The Chief Justice said that Mr. Cole then was not quite correct yesterday when he said that the attorneys on the other side did not object.

"Mr. Crosby interposed to say that it was only right to state that the retainers were given by the attorneys here, before the case had been commenced in Oudtshoorn.

"Mr. Cole said that he did not say anything about retaining fees.

"The Chief Justice understood Mr. Cole to say that the bill of costs, generally, was not objected to. If parties wished to retain counsel, of course they must pay fees for retaining him; and the charge for that was fairly made by the attorneys. What he objected to was that these fees should be charged to the opposite side. If the taxing master had been taxing costs as between attorney and client, he might have passed these items, but he was not. The next items to which the taxing master objected were for briefs to counsel for argument in the Supreme Court; and his objections were on the ground that the *fees to be paid to counsel were not marked on the briefs at the time when they were delivered to counsel*, and he (the Chief Justice) was of opinion that the taxing master was quite justified in his objection; but considering that a loose practice had crept in, the Court was not inclined to punish the parties in this case by disallowing the counsel's fees, and would therefore order this item to be restored. His Lordship said nothing here about the amount of counsel's fees. He understood that the practice at all times was that this was a matter absolutely within the discretion of the counsel himself. The Court had never interfered in the amount of counsel's fees, because if a counsel was not satisfied with the fee marked on his brief he could at all times decline to take it. Counsel might say, 'I am not sufficiently advised,' unless he saw a fee of 1,000 guineas marked on his brief and this could not be prevented. But it was a very different question when fees were to be charged against the opposite side. The attorney on the opposite side had the right to raise the question whether the fees charged against him were in accordance with regulation, and the client would have to pay the difference. There was the consideration that these two cases ought to have been consolidated into one as they were really only one action, while the cases were separately charged for. If the taxing master had exercised his discretion by reducing the amount of the fees to those payable for one consolidated case, the Court would not have interfered with his discretion. He said, 'reducing the fees' not as against counsel, but as against the client. However, as a loose practice had crept in with regard to marking fees on briefs, and the attorneys in this case had acted in a perfectly *bonâ fide* manner, the Court would restore the items. As *to the future*, the *taxing master would be quite justified in disallowing any fees not marked on the brief at the time of its delivery to counsel.* They now came to the charges for *refreshers*, and upon that point he was bound to say that the taxing master was wrong. In his own experience at the Bar refreshers were invariably paid when cases *were carried over from one term to another.* The taxing master had been misled by the practice in England, which was not at all applicable here. The English charges, for instance, included a fee to the barrister's clerk, who was unknown here. He was also misled by the attorney's bill, which stated that the argument lasted two days, whereas it lasted only one. In regard to *noting judgment*, the Court had already expressed an opinion that this was a *proper charge* and the items under this head would be restored. His Lordship thought that all parties would now clearly understand what were the views of the Court. He considered it his duty to say that, in his opinion, and he believed in the opinion of his brethren, the taxing master, in this case as well as in all others which had come before him, had performed his duty with ability, with zeal, with honesty and with impartiality."

Refreshers, Counsel's Fees, Noting Judgment, and Witness Expenses.

On *refreshers, counsel's fees, noting judgment*, and *witness expenses*, the following proceedings took place in the case of *Heydenrych* vs. *Kingon*, decided 17th September, 1889, not reported.

"Mr. Juta (afterwards Sir Henry) appeared for the applicant; Mr. Schreiner represented the respondent.

"This was an application by the appellant from a ruling of Mr. Tennant, the taxing master, with regard to costs. The suit had been before the full Court,

and had been referred to Mr. Syfret for *arbitration*. Mr. Syfret gave in his award, which was made a Rule of Court by the Bench. Decision had been given for Heydenrych with costs. When the costs came before the master for taxation he refused to pass certain items as legitimate costs as between party and party. It appeared from the report of the taxing master that seven guineas had been given on the brief to counsel to appear before the referee, and fifteen guineas for refreshers in the second, third, fourth, fifth, and sixth sittings. This was at the rate of three guineas for each appearance before the referee. This amount, twenty-two guineas in all, had been reduced by five guineas by the taxing master, *on the ground that no refresher was payable until a case had lasted on the whole more than one day's sitting, viz., five hours.*

"In support of this view the taxing master cited *Brown* vs. *Sewell* and *Harrison* vs. *Wearing*, cases settled in the Chancery Division of the English Supreme Court. On the authority of this ruling the taxing master accordingly apportioned counsel's fees, as between party and party, as follows: The brief of seven guineas to cover the first five hours' work, and a refresher of five guineas to cover each successive five hours' work. As the six sittings of the referee had lasted in all fourteen and a half hours the taxing master allowed counsel's fees to the amount of seventeen guineas, in accordance with the above quoted rule of seventeen guineas. As a further authority the taxing master also cited the Bar Rules, dated January 7th, 1867, in which the following occurs: 'Examination *de bene esse*, or before commission, arbitration, or attendance before arbitrator for any time, or any one day not exceeding three hours, three guineas; exceeding three hours, five guineas,' and which was quoted by the plaintiff as an authority for fees charged. A rigid adherence to this rule, the taxing master reported, would reduce the amount of fees to fifteen guineas. Another point, the second on which exception was taken to the taxing master's decision, was on the *question of witnesses' expenses*. A Mr. Le Sueur was examined before the referee, but was kept in attendance, according to counsel's instructions, four days before he was examined. In the bill of costs four guineas were claimed as expenses of attendance for Le Sueur, but the taxing master disallowed three *on the ground that the witness could have been easily examined at the first sitting*. The third point on which exception was taken to the taxing master's ruling was on the *question of counsel's fees*. When the arbitration came on for final hearing before the Court two counsel were employed, but the taxing master only allowed the expenses of one at five guineas. The matter, the Master considered, could have been fully dealt with by the one counsel who appeared before the referee, as it only appeared on the motion roll for the Court's approval of the arbitrator's finding.

"After argument by counsel,

"The Chief Justice said, in his opinion the taxing master had very properly disallowed the first item, and if he had followed strictly the Rule laid down by the Bar in 1867 the charge would have been fifteen guineas for the five days, because the adjournment on the first day was at the request of the plaintiff's counsel, thus leaving only five days in respect of which the defendant should be called upon to pay counsel's fees. On none of the occasions did the sitting of the arbitrator last more than three hours, and the maximum charge accordingly would be three guineas for each sitting, making fifteen guineas altogether. With regard to the exception taken to the expenses of the witness Le Sueur, he (the Chief Justice) thought that he ought to have been examined the first day, and if it suited the plaintiff that Le Sueur's evidence should be withheld for some days, the defendant ought not to be held liable to pay the additional costs. The taxing master's decision on this point also should be upheld.

"On the third question, as to the employment of the two counsel when the referee's decision came before the Court, he (the Chief Justice) was sure that the taxing officer was quite right in *point of form* in not allowing fees for two counsel as the *matter was set down as a motion*. But though it was a *motion in form*, it was *really part and parcel of the original case* before the Court. No final judgment had been given, although it was indicated what the final judgment should be. There was, however, no finality in the judgment before it was referred to the arbitrator, and when it was set down as a motion it misled the taxing officer into allowing only one counsel's fees. It appeared to him (the Chief Justice) that it was the *ordinary course, if a case was of sufficient importance, two counsel should*

be employed in the first instance, and if it remained of sufficient importance that two counsel should at the final stage of the case be heard before the Court. He accordingly thought that this point ought to be referred back to the taxing officer for his reconsideration, and he (the Chief Justice) had no doubt that the taxing officer would alter his decision upon this third point as to the fees allowed to counsel at the final hearing. He (the Chief Justice) thought it was only fair, as each party had to some extent succeeded, that there should be no order made as to the costs of the application.

"The Court accordingly made an Order upholding the decision of the taxing master on the first two points, and as regards the third point, viz., what fees should be allowed to counsel at the final stage, it was remitted to the taxing officer for reconsideration."

On Counsel's Fees.

In the case of *The Beaufort West Municipality* vs. *Wernich* (not reported), the following items were on the 31st August, 1882, reviewed by the Supreme Court, viz. :—

	£	s.
Paid Senior Counsel's fee	10	10
Paid Junior Counsel's fee	7	7

The taxing officer, Mr. Crosby, reduced the first item by three guineas, and the second item by two guineas. He thought the fees too high.

The case originally came on for trial at the Beaufort West Circuit Court before the Chief Justice, who, after hearing the witnesses, ordered the case to be argued in the Supreme Court.

The case was one of considerable difficulty, and a large number of authorities had to be consulted, and a large number were referred to at the argument. The losing party did not object to the fees as charged in the bill, but nevertheless the taxing officer made the reductions mentioned, assigning as his sole reason for so doing that he thought the fees too high.

The following is a brief report of what took place in the Court on the review of the bill:—

The Chief Justice: Is there any case on record in which the Court has ever interfered with the discretion of the taxing master with reference to counsel's fees?

Mr. Cole: I submit that the taxing master has no means of knowing the trouble involved in these cases, whereas the attorneys who mark the brief have an opportunity of knowing.

The Chief Justice: Then we had better abolish the taxing master altogether.

Mr. Cole said he had never known counsel's fees interfered with by the taxing master unless there was something greatly out of the way. The attorneys were supposed to exercise reasonable discretion in these matters, and they knew better than outsiders, as taxing masters must necessarily be, what was a fair charge. If, however, the Court held there was no appeal against the taxing master's judgment he had nothing further to say.

Mr. Upington said he was counsel on the opposite side in this case, and it appeared that the counsel's charges on the one side had been reduced to the same amount as those on the other side.

The Chief Justice: Were you on the winning side?

Mr. Upington: Well, we lost, my lord (laughter).

The Chief Justice said the most recent decision on this point was in a case in which the fees of Queen's Counsel had been interfered with, and it was laid down by the Master of the Rolls that the rule was a most valuable one, that the *Court would not interfere with the decision of the taxing master with respect to counsel's fees unless some grave mistake had been committed.* He quite adopted the views of the Master of the Rolls, *and as no grave mistake appeared to have been committed in this case*, the review must be refused with costs.

On Counsel's Fees as between Attorney and Client.

In the case of *Roux* vs. *Roux* (decided 19th December, 1882, not reported), the following proceedings took place :—

This was an application for the review of the taxing officer, Mr. Crosby's taxation, Mr. Upington, Q.C., appearing for the applicant.

The brief of counsel who had been appointed curator ad litem in the above case

was marked at five guineas, but the taxing officer had reduced it to three guineas. Mr. Upington contended that the fixing of these fees was purely a matter of contract between the *counsel and the authorised agent of the client*, and the taxing officer had no authority to interfere with it. If the attorney exceeded his authority it would be competent for the client to obtain redress against him.

The Chief Justice said he was willing to hear any argument upon the reasonableness of the fee in this case, *but he could not agree to the view that the taxing officer had no discretion as between attorney and client.* By going to the taxing officer the attorney was able to get judgment at once that the amount passed by the taxing master was due to him.

Mr. Upington said he did not understand why this principle should be applied to only one class of persons in the country. If it were to apply equally to shoemakers, tailors, and every one else, he could understand that they were coming to an Utopian system.

Mr. Crosby, the taxing master, said the brief had originally been marked three guineas, but it was afterwards altered to five guineas. It was an unopposed case, and he thought himself justified in reducing the amount at which the brief was originally marked.

Mr. Justice Dwyer said he remembered that Sir Fitzroy Kelly made a rule that he would never go into Court under 100 guineas, and he always got it. In fact he obtained more briefs afterwards than before, through his placing so high a value upon himself.

The Attorney-General said he might say that he had never known a case of this kind since he had been at the Bar in which the fee was less than five guineas.

The Chief Justice said when he was at the Bar the fee was never more than three guineas.

After some further argument,

The Chief Justice said it was an *enunciated principle in this Court* that the Court *would not interfere with the taxing master, at all events, not in taxation between party and party.* The present case, however, was not between party and party, but between *attorney and client.* It appeared that in the first instance the taxing master was justified in coming to the conclusion that the five guineas ought not to be allowed, for the simple reason that he was told by the clerk that the fee of three guineas was originally placed upon the brief. Subsequently, however, the fee was altered to five guineas, but the information was not before the taxing master that this had been done in the presence of the clerk. The Court might now act upon that information, and considering that several witnesses had to be examined, and that this had taken up as much time as a trial case, the fee did not appear to be excessive. He was not prepared, however, to endorse the opinion of Mr. Upington, that the taxing master was not justified in taxing costs between an attorney and client. The Court would allow the fee of five guineas.

Mr. Justice Dwyer said no doubt if the information now before the Court had been before the taxing master at the time he would have allowed the fee.

On Counsel's Fees between Attorney and Client, and Refreshers.

In the case of *Spengler* vs. *Sea Point Municipality*, on reviewing bill of costs as between *attorney and client*, the Court refused to interfere with the taxing officer's discretion in reducing Senior Counsel's fee on trial from £12 12*s.* to £10 10*s.* and the Junior Counsel's fee from £9 9*s.* to £7 7*s.*; and on the *refreshers* to both counsel from £5 5*s.* to £3 3*s.* (Supreme Court, 13th July, 1883, not reported). The Chief Justice on this occasion said :—

"He found, from the bill of costs put in, that the counsel whose fees were mainly in dispute received twelve guineas for his brief, five guineas for a refresher, and five guineas per diem also for refresher. The taxing officer struck off two guineas from the twelve guineas and two guineas from the five guineas refresher, leaving the sum of eighteen guineas to be paid to the counsel. In the case of another, the fee of nine guineas was reduced to seven guineas. The question for the Court now to decide was whether, as this was a *taxation between attorney and client*, the taxing officer was justified in making these reductions. He had carefully looked into the authorities in order to see what the English practice was, and found that there the taxing officer made no distinction as between attorney and client and between party and party; in fact, the Courts in England

went so far as to hold that, even if there were a special agreement between attorney and client that a certain sum should be paid by the latter, the taxing officer was quite justified in making reductions, as in his discretion were required, under the circumstances surrounding each case. (His Lordship here quoted several English authorities bearing on the subject.) The Judges in England applied the rule that every bill of costs must be subjected to the scrutiny of the taxing officer. In the present case it had been said that the attorney ought to be looked upon in the light of an ordinary agent, and that the taxing officer ought not to have disallowed any of the fees unless the attorney had been guilty of gross negligence. It appeared to him, however, that there was a fallacy in this argument of treating the attorney as an ordinary agent. An attorney was an officer of the Supreme Court, and was consequently bound by the rules of the Court, and was also bound by such fees as the Court allowed in all similar cases. The contract between attorney and client was that the latter should pay to the former such fees as would be allowed on taxation. If, in the present case, the Commissioners of the municipality had consented to pay the fees, there would have been no difficulty whatever; but, so far from consenting to this course, a letter had been received from the secretary to the contrary effect. It seemed to him also that there was a fallacy in the argument that the taxing officer ought to have inquired whether there had been any negligence on the part of the attorney; but this was not a question for the taxing officer to go into at all, as it was his duty to apply the ordinary rules of taxation to every particular case. In this case he found, on reference to the affidavit of Mr. Buissinné, that the charges were made as prescribed by the Bar Rules passed on the 12th August, 1882. This was the first time that he had had any official knowledge that any Bar Rules were passed on that date. There had been something about the matter in the papers, but he had heard nothing officially. If these Rules made any increase in what were hitherto considered the minimum fees to be paid to counsel, he must say that he could not recognise them in any way. The only Bar Rules he knew of were those passed when he was at the Bar. The matter was at the time fully considered; and before the fees were then fixed, the older practitioners were consulted, among them being Sir Christoffel Brand and Mr. W. Porter. The attorneys at the time wished for some definite expression of opinion from the Bar as to what they considered should be the *minimum* fees, and the Chief Justice of the day was consulted on the subject. After satisfying himself that it was not proposed to make any alteration in the existing practice, he said he saw no objection to the Rules, but at the same time they could not be introduced as a Rule of Court, as it had never been the practice in any official form to fix the fees of counsel. If the taxing officer considered it to be his duty to abate all that he considered unreasonable, the Court could not find fault with him. It was quite competent for any member of the Bar to place his own value on his own services, and there could be no objection to that. There seemed to him to be an objection to a certain number of members of the present Bar imposing any Rules binding upon everyone else with or without their consent. If any increase were proposed, he must confess that he saw very grave objections to such a course. In the present case the taxing officer had allowed a very liberal amount. When he (the Chief Justice) was at the Bar these fees would have been considered very high. No doubt since that time the value of money had diminished, and the cost of the ordinary necessaries of life had increased; but, at the same time, the amount he allowed was much more liberal than would have been allowed when he (the Chief Justice) was at the Bar. The scale was much more liberal now than then, and to this he offered no objection. It must be borne in mind that business was increasing, and that by having too high a scale the tendency to increase would be checked. It was not really to the interests of practitioners to raise their charges to any great extent. For himself, when he was appointed to the Bench his main objects were to increase, as far as lay in his power, the efficient administration of justice, and also to cheapen that administration. How far he had been successful in his first object it was not for him to say; though he could say that his second object had not been very successful; but he should set his face against any tendency to increase costs. It was the duty of the State and the Bench to bring justice home to every man's door, but it should not be made in certain senses prohibitive. There had always been a desire on the part of

the Bar to assist persons who were unable to pay the costs of their cases; and an acknowledgment was due from the Bench and the public to those members of the Bar who had always been willing to come forward and assist persons who wished to obtain justice and had not the means. But there were other people who, though not exactly without means, yet were not in a position to spend a large sum of money on taking their cases into Court; and the Court ought to be careful not to encourage anything which would prevent that class of persons from obtaining justice. This was his view, and it seemed to him that the taxing officer had not been illiberal in his allowance, which was perfectly fair and reasonable, and his taxation should not therefore be interfered with."

On Counsel's Fees agreed to by both parties.

In the case of *Walker* vs. *Liquidator Cape Central Railways* (1 C.T., 152), which was one of great complication, and where, by *agreement between the respective attorneys engaged in the case, the Senior Counsel's fees on each side were marked at a hundred guineas and the Junior Counsel's at seventy*, the taxing officer deducted fifty guineas off the fees of leading counsel and thirty-five guineas off those of the juniors. On review the Chief Justice said:—

"I must confess that I am somewhat astonished at this fee, especially after the remarks made by the Court in previous cases. There was a time when, as between party and party, a fee of ten guineas would have been considered exceptionally high; and now an objection is raised to a fee of fifty guineas which has been allowed, as between party and party, by the taxing officer. It is quite clear that, as far as the personal feelings of the Court are concerned, we should be only too glad to see counsel well rewarded in every case in which they are engaged. It is for the interests of the public that the best talent in the country should be drawn to the Bar; and one of the means of doing that is the general knowledge that entering the Bar leads not only to fame, but also to fortune. But the Court cannot allow its personal or its professional feelings to sway in a matter where the interests of the public are concerned. It is for the public interest that law costs should be kept as low as possible. I think in a country like England it has become a public scandal that litigation has become a luxury. The result has been that County Courts have been created, where the fees are much lower and are gradually drawing away a great part of the fees from the higher Courts of law where the cases could be better dealt with. In this country also the tendency undoubtedly has been—at least, since I have been on the Bench—that costs as between party and party are on the increase. For myself, I have always, even at the risk of perhaps giving offence to practitioners, thought it my duty to protect the public as much as I could. But still there is a tendency for costs to increase, and, undoubtedly, costs at this moment are very much higher than they were some years ago. This may be partly owing, no doubt, to the general increase of wealth in the country and the general status of living, but the fact remains. Now, as I said before, a fee of fifty guineas has been allowed by the taxing officer. In my opinion, as between party and party, it is ample. I am by no means prepared to say that counsel would not have been justified in saying he would not take less than a hundred guineas; but it does not follow that the Court is bound to say that, as between party and party, the other side should pay those costs. For these reasons I think this appeal ought to be dismissed with costs." (See also *Logan* vs. *Colonial Government*, 3 C.T., 225.)

Where two Counsel engaged, Junior Counsel's fee disallowed.

In a case where *two counsel* were employed the *taxing officer held that one was sufficient*, from the nature and circumstances of the case, and disallowed the expenses of the second brief and Junior Counsel's fee. The Court, on review of the items, confirmed his decision, on the ground that a great deal of discretion must necessarily be left to him (*Teengs* vs. *Garlick*, 1 C.T., 156).

Where two Counsel engaged, Junior Counsel's fee allowed.—Translation of Placaat allowed.

In the case of the *Treasurer of the Colony* vs. *Bosman* (10th August, 1883, not reported), Mr. Maasdorp made an application for a review of the taxation,

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
Attending him therewith and thereon	0	3	4	0	3	4
The like brief, fee and attendance to Junior Counsel.						
Attending Court case on roll :—						
If trial cases and witnesses examined[1] ...	1	1	0	2	2	0
If argument only	0	13	4	1	1	0
Postponed absence of material witness ...	0	13	4	0	13	4
Judgment given	0	13	4	1	1	0
Drawing refresher to counsel (see note[2], pp. 861–69)	0	5	0	0	5	0
Paid Mr. Advocate—fee—Senior Counsel.						
Attending thereon	0	3	4	0	3	4
The same refresher to Junior Counsel	0	5	0	0	5	0
Paid his fee.						
Attending thereon	0	3	4	0	3	4
The like charges for every subsequent day.						
Attending Court : case concluded : judgment deferred, same as above.						
Letter to local attorney hereon	0	5	0	0	5	0
Brief to counsel to note judgment[2]	0	5	0	0	5	0
Paid Mr. Advocate—fee—Senior Counsel.						
Attending thereon	0	3	4	0	3	4
The same brief, fee, and attendance to Junior Counsel, except where defendant was in default.						

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which *referred to the disallowance of the fees of Junior Counsel* on the *ground that their employment was wholly unnecessary.* A sum of two guineas was also taxed off the Senior Counsel's brief, and the cost of *translating an old law* disallowed. Mr. Maasdorp argued that the case was one involving much law and necessitating the investigation of many authorities, and that two counsel were required under the circumstances. In support of his argument he referred to the cases of *Kirkwood* vs. *Webster*, 9 L. R., Ch. Div., 239; *Morris* vs. *Hunt*, 1 Chitty's Rep., 550; *Grindal* vs. *Godman*, 5 Dowl. Rep., 379. The Chief Justice said that the question raised in this case was comparatively new, and it was therefore admitted that one general principle should be laid down. This was a special case and, though the proceedings were not very voluminous, the amount involved was very large and the question of law very important. It seemed to him that it *was a case in which* the Court might *reasonably expect the assistance of two counsel*, and that the item should be allowed. With regard to the other items, the taxing officer had exercised a wise discretion. Although it might be necessary to the Court to have the assistance of two counsel in respect of the legal arguments, two counsel were not necessary to draw the short brief. In regard to the *translation of the old document*, the reasons which actuated the taxing officer were perfectly correct. The *Placaat* had been of very great assistance and benefit to the Court, and so were other translations, and in this case the expenses would be allowed. Old Dutch laws had continually to be translated, but it would be a very dangerous precedent if the cost of translation was to be allowed in every case. No order would be made as to costs."

[1] The taxing officer looks to the time case occupied, allowing £2 2*s.* for a full day of five hours.

[2] See the cases, *supra*, of *Edmeades* vs. *Mostert*; *Edmeades* vs. *Scheepers*; and *Heydenrych* vs. *Kingon*.

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
Attending Court judgment for with costs... ...	0	13	4	1	1	0
Attending to take out Order of Court	0	3	4	0	3	4
Paid stamps thereon.						
Letter to local attorney informing him of result of case	0	5	0	0	5	0
Attending at Registrar's office for Order of Court ...	0	3	4	0	3	4
Copy order for service 1*s.* per folio.						
Attending to serve	0	3	4	0	3	4
Attending the witness, Mr. ——, taking particulars, and settling his witness expenses	0	3	4	0	3	4
Paid him (see tariff for witnesses).						
(The same charge for attendance, &c., on every subsequent witness).						
Attending taxing officer to fix time for taxation and drawing notice of appointment...	0	5	0	0	5	0
Copy notice for service, and service...	0	2	6	0	2	6
Attending taxation	0	3	4	0	6	8
Attending per hour	0	6	8	0	6	8
Bill of costs and fair copy for first side of 30 lines	0	5	0	0	5	0
Every additional side	0	2	6	0	2	6
Copy for service	Half of original.					
(The service thereof and of copy Order of Court and of notice of taxation are to be served at the same time, with the notice of taxation mentioned above, and are included in the same charge of 2*s.* 6*d.*)						
If service is to be made in the country, then the same as for any other notice for service out of town.						
If the defendant or his Attorney does not appear at the taxation, then the charges for affidavit of service, &c., are allowed in addition.						
Letters, papers, messages, attendances, &c. ...	Discretionary.					
Attending on settlement	0	3	4	0	3	4
Letter to local agent informing him of the taxation of his costs and remitting him his costs ...	0	5	0	0	5	0
Paid taxing officer's fee 1*s.* in the £.						
[N.B.—The charge for affidavit of service shall be allowed only where it is essential.]						
[N.B.—Where several documents are served upon the same person at the same time and in the same case, the charge for service shall be as if only one document had been served.]						
[N.B.—The defendant's bill of costs as between party and party to be on the same principle as plaintiff's]—the following preliminary items also allowed :—						

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
Attending defendant with letter of demand served on him and perusing same, and taking his instructions to reply thereto	0	3	4	0	6	8
Letter in reply (same as plaintiff's).						
Attending the defendant with summons served on him and perusing same	0	3	4	0	6	8
Instructions to defend[1]	0	3	4	0	6	8

Costs on Writ.

(If necessary correspondence, or attendances, between the taxation of costs and before issue of writ, it is in the discretion of the taxing officer to allow them, the rest of the charges are as follows) :—

Drawing writ of execution and fair copy[2]	0	5	0	0	5	0
Attending at the Registrar's Office to issue it ...	0	3	4	0	3	4
Paid stamp and signing.						
Attending at Sheriff's Office to register writ ...	0	3	4	0	3	4
Paid postage of writ to Deputy Sheriff.						
Bill of costs and fair copy	0	5	0	0	5	0
Attending taxation	0	3	4	0	3	4
Attending upon settlement and granting receipt ...	0	3	4	0	3	4
Letter to local attorney advising settlement and remitting	0	5	0	0	5	0

Costs on Exceptions.

(On the same principle as costs on pleadings and argument thereon. If witnesses are called on the exceptions, then the same as on trials.)

Costs on Commissions de Bene Esse.

Same as on motions and cases. And as to the charge for perusing evidence taken on commission, same as on appeals.)

Costs on Motion.

Attending applicant taking instructions to apply for an interdict (or whatever it may be) to restrain the respondent from, &c.	0	3	4	0	6	8

Drawing affidavit and fair copy at 2*s.* 6*d.* per folio, but not less than 5*s.*

[1] In case any plans or surveys are necessary, see the cases of *Heynes, Mathew & Co.* vs. *Cape Town Town Council* and *De Villiers* vs. *Cape Divisional Council* (*supra*, previous Chapter).

[2] If the writ is necessarily longer than usual the taxing officer can, in his discretion, allow an extra charge.

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
Attending to be sworn	0	3	4	0	3	4
Paid stamp.						
Copy affidavit for service	Half of original.					
In case of special affidavits, the charge is allowed for "instructions for affidavit"	0	3	4	0	6	8
The same charges for every necessary additional affidavit.						
Drawing notice and fair copy to be served on defendant that Court would be moved on the for &c., at 2*s.* 6*d.* per folio.[1]						
Each copy for service at 1*s.* per folio.						
Service thereof and of affidavit	0	3	4	0	3	4
Attending at Registrar's Office to file affidavit ...	0	3	4	0	3	4
Paid stamps.						
Attending upon receipt of affidavit on behalf of respondent and perusing and considering same	0	6	8	0	6	8
Attending applicant therewith and conferring and taking instructions for affidavit in reply ...	0	3	4	0	6	8
(Same charges for all subsequent affidavits served when necessary.)						
Drawing same (charges on same principle as on affidavit first drawn at beginning, and so on on all subsequent affidavits, &c.)						
Copies of documents referred to in the affidavit for service at 1*s.* per folio.						
Instructions for brief[2]	0	3	4	0	3	4
Drawing same at per brief sheet	0	6	8	0	6	8
Fair copy, with copy notice, affidavits, documents, &c., annexed at per brief sheet...	0	3	4	0	3	4
Paid Mr. Advocate—fee—Senior Counsel.						
Short brief to accompany	0	5	0	0	5	0
Attending thereon	0	3	4	0	3	4
The like copy brief to Junior Counsel, same as copy brief to Senior Counsel, but if Respondent is in default then no costs on brief and fee to Junior Counsel are allowed as between party and party, unless the motion has reference to, or is in connection with, a pending action in which the two Counsel are engaged, or in an action already decided in which the two Counsel were engaged together.[3]						

[1] In matters of intricacy the T. O. will allow more, as the Tariff only provides for *ordinary* notices.

[2] The T. O. sometimes allows more, as on Trials, if matter is of importance.

[3] See *supra*, *Heydenrych* vs. *Kingon* (pp. 863–865).

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
Paid Mr. Advocate—fee—Junior Counsel.[1]						
Short brief to accompany	0	5	0	0	5	0
Attending thereon	0	3	4	0	3	4
Attending Court application granted (or state what became of it)	0	13	4	1	1	0
If application is postponed for further affidavits, then the same charges will follow on every additional affidavit on the principles laid down for first affidavits.						
If the application came through a local attorney or agent, then the necessary correspondence is to be charged on the usual scale of charges on correspondence.						
Attending to obtain order of Court (from here to end of bill, same as in Actions).						

Costs on Compulsory Sequestration.

Attending at the Sheriff's Office to search for return to writ when a return of *nulla bona* was made	0	3	4	0	3	4
Paid Deputy Sheriff charge on writ.						
Letter hereon to local attorney	0	5	0	0	5	0
Attending upon receipt of reply with instructions to get estate placed under sequestration ...	0	3	4	0	3	4
Instructions for petition and drawing same and fair copy, at 2*s.* 6*d.* per folio.						
Attending plaintiff for signature	0	3	4	0	3	4
Affidavit of verification in support of petition and fair copy	0	5	0	0	5	0
Attending to be sworn	0	3	4	0	3	4
Paid stamp.						
Drawing security-bond to be given to the Master	0	5	0	0	5	0
Attending plaintiff therewith and getting same signed	0	3	4	0	3	4
Attending to file same with the Master and on his approval to bespeak certificate that security has been given and attending subsequently for same and to pay charges	0	3	4	0	6	8
Paid the Master for his certificate	0	10	6	0	10	6
Letter to local attorney forwarding petition and affidavits, &c., for signature	0	5	0	0	5	0
Paid postage.						
Attending upon receipt of reply returning petition and affidavit duly signed and sworn to and examining same	0	6	8	0	6	8

[1] See *supra*, *Heydenrych* vs. *Kingon*.

	COMMON CASES. £	s.	d.	SPECIAL CASES. £	s.	d.
Letter in reply acknowledging receipt of petition, &c.	0	5	0	0	5	0
Drawing order for the Judge to be signed and fair copy	0	5	0	0	10	0
Attending at the Registrar's Office to file petition	0	3	4	0	3	4
Attending Registrar for order and to pay fees ...	0	3	4	0	3	4
Paid for same and stamp.						
Drawing summons for compulsory sequestration.						
(The costs from here are the same as on Provisional Sentence Summonses.)						
(If the sequestration *is opposed*, the costs from thence are as on Motions. Then brief and fees are the same as on Motions.)						
[N.B.—In cases where the defendant is absent from the Colony, or his whereabouts is not known, then the expenses of publishing summons in the *Gazette* and posting it on Court door and other necessary and incidental expenses thereto shall also be allowed in addition to the above.]						

Costs on writ of Civil Imprisonment.

(*The same scale as costs on Provisional Sentences*, and when opposed, from thence the same as on Motions.)

On Appeals from the Circuit Court.

Attending upon receipt of letter with instructions to prosecute appeal	0	6	8	0	6	8
Attending at Registrar's Office to ascertain whether records had come up, &c.	0	3	4	0	3	4
Drawing power to appeal	0	3	4	0	3	4
Attending to file power with Registrar	0	3	4	0	3	4
Paid stamp and filing.						
Letter in reply acknowledging receipt of instructions, &c.	0	5	0	0	5	0
Notice to the Registrar to set down appeal ...	0	5	0	0	5	0
Attending to set down appeal	0	3	4	0	3	4
Paid for same.						
Notice to be served on Respondent of day of hearing the appeal	0	5	0	0	5	0
Copy for service and serving	0	2	6	0	2	6
Drawing affidavit of service (if necessary)	0	5	0	0	5	0
Paid stamp.						

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
Letter transmitting notice of service	0	5	0	0	5	0
Paid postage.						
Attending upon receipt of reply of service of notice, &c., and perusing and examining return	0	3	4	0	6	8
Letter in reply acknowledging receipt and transmitting his charges	0	5	0	0	5	0
Paid for service.						
Attending at the Registrar's Office for the purpose of and perusing and considering evidence and the rest of the record at 6*d.* per brief sheet, but in no case less than 10*s.* 6*d.*[1]						
Attending surveyor to bespeak copy diagram filed with record	0	3	4	0	3	4
Attending subsequently for same and to pay charges	0	3	4	0	3	4
Paid for same.						
Instructions for brief	0	3	4	0	6	8
Drawing same (same as on Trials).						
Fair copy with copy records (same as on Trials unless records are printed).						

[1] In the case of *Ohlsson* vs. *De Beers Mining Board* (on a review of a bill of costs in the Supreme Court on 31st August, 1882, not reported) as to the following item, "*Perusing and considering record,* 12 *brief sheets at* 6*s.* 8*d. per* 3 *brief sheets,* £1 6*s.* 8*d.*," the taxing officer, Mr. Crosby, deducted 16*s.* 2*d.* from this item and made the following note to the bill: "Before finally deciding Mr. . . . . drew my attention to the charge 6*s.* 8*d.* per 3 brief sheets for perusing and considering record, and stated that he wished me to consider whether I would not allow 6*s.* 8*d.* for every 25 folios instead of reducing the items to 6*d.* per brief sheet. As this charge was never made before to my knowledge in this Colony, and as the amount claimed is that allowed in appeals to the Privy Council, it seemed to me that a smaller rate would be sufficient in cases before the Court of Appeal here. *I accordingly fixed* 6*d. per brief sheet, but not to be less than* 10*s.* 6*d. in any case for perusing brief.*"

On this, after argument, the Chief Justice said: "It was admitted in this case that the *charge of perusal of papers* was a new one. The question now was whether the charge should be allowed. The taxing master had told the Court that other attorneys had made a charge of 6*d.* per sheet, but in this case 1*s.* per sheet was claimed. The taxing master at first refused to allow the charge, but subsequently allowed 6*d.* per sheet. The only ground on which 1*s.* was charged was that this was the amount charged in Privy Council cases, but he would be very sorry to take the Privy Council charges as a model for this Court, because it was well known that those charges were very extravagant, and in many cases amounted to a denial of justice.

"The taxing master had considered the matter fully, and had come to the conclusion that 6*d. a brief sheet was a fair remuneration* for the attorney, and he (the Chief Justice) thought on the whole this was right. He had fixed 10*s.* 6*d. as the minimum charge and not the maximum.* In this case the record was not a voluminous one, but it might have been of similar dimensions to that of the Kimberley Town Council, in which case the attorneys would have been very amply remunerated. *He thought* 6*d. a fair charge,* and the application for review must therefore be refused with costs."

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
Paid Mr. Advocate—fee—Senior Counsel.[1]						
Short brief to accompany	0	5	0	0	5	0
Attending thereon	0	3	4	0	3	4
Copy brief for Junior Counsel (same as brief for Senior Counsel).						
Paid Mr. Advocate—fee—Junior Counsel.[1]						
Attending thereon	0	3	4	0	3	4
Attending Court, case on roll but not called ...	0	10	6	0	13	4
Attending Court, appeal (allowed) or dismissed with costs (same as in argument cases) ...	0	13	4	1	1	0
(The rest of the bill same as on Actions.)						
In addition to the above also the following charges *in the Court below* in addition to other necessary charges.						
Attending client with instructions to appeal against judgment	0	3	4	0	6	8
Brief to counsel to move for leave to appeal ...	0	5	0	0	5	0
Paid his fee.						
Attending thereon	0	3	4	0	3	4
Drawing security-bond	1	1	0	1	1	0
Attending appellant and sureties signing same (on each)	0	3	4	0	3	4
Attending Respondent Attorneys when they also approved of same	0	3	4	0	3	4
Attending therewith before Judge when he approved of same	0	3	4	0	3	4
Attending to file same with Registrar of Court ...	0	3	4	0	3	4

APPEALS FROM MAGISTRATE'S COURT.

On the same principle as appeals from Circuit Court, except as to charges necessary on security bond.

PRIVY COUNCIL.

Preliminary costs in appeals to the Privy Council.

Attending client, conferring and taking his instructions to appeal to the Privy Council	0	6	8	0	6	8
Drawing Petition for leave to appeal and fair copy at 2*s.* 6*d.* per folio, but not less than	0	5	0	0	5	0
Attending client for signature	0	3	4	0	3	4
Verifying affidavit	0	5	0	0	5	0
Attending to be sworn	0	3	4	0	3	4
Attending to file petition with the Registrar ...	0	3	4	0	3	4
Paid filing and stamps.						

[1] See "References to Cases," *supra*, as to counsel's fees.

	COMMON CASES.			SPECIAL CASES.		
	£	s.	d.	£	s.	d.
Drawing security bond and fair copy	1	1	0	1	1	0
Attending client and sureties for their signature at	0	3	4	0	3	4
Attending Judge for his approval of security given	0	3	4	0	3	4
Notice to Respondent Attorney of appeal (same as on Notices of Motion).						
Notice to Respondent Attorney of names and addresses of Solicitors in England (from beginning to end of appeal same as on Commission *de bene esse*, and Motions).						

CHAPTER XLVI.

ELECTION PETITIONS.

THERE is no necessity at present to give the theoretical branch of this subject; but as only two cases have arisen under the new Act, the *practical forms* then used are here given for convenience for future similar cases.

Petition to set aside an Election for Bribery.

In the Supreme Court,
&c., &c.

(Heading.)

The petition of W.A.K., of S., humbly sheweth :—

1. At a public Court or meeting duly convened and held according to law on the 19th day of January, 1894, your petitioner and certain other candidates, to wit: the Hon. J.H.H., P.D.W., and P.J.B., were duly nominated as members of the House of Assembly of this Colony for the electoral division of Stellenbosch.

2. Thereafter a poll was duly demanded and was taken throughout the said division on the 26th January, 1894.

3. On the 2nd February, 1894, the Civil Commissioner, the Returning Officer of the said electoral division, declared the state of the poll to be as follows :—

The Hon. J.H.H., 785 votes; Mr. P.D.W., 534 votes; your petitioner (W.A.K.), 524 votes; Mr. P.J.B., 296 votes; and he thereupon proclaimed that the said H. and the said D.W. had been returned and elected as members of the House of Assembly for the division of Stellenbosch aforesaid.

4. By proclamation in the Government *Gazette* of 9th March, 1894, the names of the said J.H.H. and the said D.W. had been published as the elected members for the said division.

5. The return and election of the said D.W. was undue and illegal by reason of corrupt practices and irregularity in the following respects :—

(*a.*) The said D.W., by himself or by other persons on his behalf, gave, or agreed to give, or offered, promised, or promised to procure, or to endeavour to procure, money or valuable consideration to or for certain

voters, or to or for certain persons on behalf of certain voters, in order to induce such voters to vote or refrain from voting at the said election, and did so far as certain of the said voters are concerned corruptly give or procure such money or valuable consideration on account of such voters having voted or refrained from voting at such election.

Your petitioner annexes hereto a schedule marked "A" giving particulars of certain of the acts of bribery herein referred to. Particulars of the further acts complained of will be furnished hereafter.

(*b*.) The said D.W. corruptly by himself or by other persons on his behalf gave or provided, or caused to be given or provided, or was accessory to the giving or providing, certain drink to or for certain persons for the purpose of corruptly influencing such persons or other persons to give or refrain from giving their votes at such election or on account of such persons having voted or refrained from voting at such election.

Your petitioner annexes hereto a schedule marked "B" giving particulars of certain of the acts of treating herein referred to.

Particulars of the further acts complained of will be furnished hereafter.

(*c*). The Returning Officer aforesaid has been guilty of irregularity in that he illegally, and by way of scrutiny after the votes had been recorded, struck off the votes of three voters, which votes had been duly recorded for your petitioner, and which votes should have been added to the number set forth in the third paragraph of the petition as having been given for him; and one G.C.H. has been guilty of irregularity in that being the paid agent of the said D.W. he irregularly recorded his vote in favour of the said D.W., which vote should have been deducted from the number recorded as aforesaid in favour of the said D.W., and a vote recorded in favour of the said D.W. in the name of a voter who had died before the date of the said election.

Your petitioner annexes hereunto a schedule marked "C" giving particulars of certain of the voters so improperly struck out and recorded. And also the particulars of the vote wrongly recorded for the said D.W. in the name of a voter who had died before the date of the said election.

Particulars of the further irregularities complained of will be furnished hereafter.

6. If the votes given in favour of the said D.W. by the persons who were bribed or treated or who improperly recorded their votes as aforesaid be deducted from the number of votes declared by the Returning Officer to have been given for the said D.W., and if the number of votes improperly struck off the number given for your petitioner be added thereto, it will be found that your petitioner has received more votes at the said election than the said D.W.

Wherefore your petitioner prays that it may please your Lordships to declare the election of the said D.W. to be null and void, and that your petitioner has been duly elected as member aforesaid for the said Electoral Division, and that he may have his costs for this petition, or that your Lordships may make such further or other orders as to your Lordships may seem meet.

Answer to foregoing.

The *Respondent* filed the following answer to the petition :—

1. The respondent admits the allegations contained in the first four paragraphs of the petition.

2. The respondent denies the allegations contained in paragraphs 5 and 6 of the petition, and in the several schedules annexed thereto, including the schedule of further particulars filed of record on 1st May, 1894.

3. As to section (*c*) of paragraph 5 of the petition, the respondent says that if the Returning Officer should be held by this Honourable Court to have acted irregularly in striking off any votes once recorded, then the said Officer acted irregularly in striking off as many votes for the respondent as for the petitioner, and of nine votes as struck off and which had been recorded for the respondent, those set forth in the schedule marked (I) and hereto annexed should be restored.

4. In respect of so much of the petitioner's prayer as claims a declaration that he has been duly elected as member for the Electoral Division of Stellenbosch, the respondent craves leave, if need be, under Section 43 of Act 9 of 1883 to lead evidence showing that the alleged election of the petitioner was undue, as will more fully hereinafter appear.

5. The petitioner W.A.K., by himself or by other persons on his behalf, gave or agreed to give, or offered or promised to procure, or endeavoured to procure, money or valuable consideration to or for certain voters, or to or for certain persons on behalf of certain voters, in order to induce such voters to vote or refrain from voting at the said election, and did as far as certain of the said voters are concerned corruptly give or procure such money or valuable consideration on account of such voters having voted or refrained from voting at such election.

The respondent annexes hereunto a schedule, marked II., giving particulars of certain of the acts of bribery herein referred, the respondent craving leave, in case further acts of bribery should be discovered, to bring them also, under the aforesaid section, to the notice of this Honourable Court.

6. The petitioner corruptly by himself or by other persons on his behalf gave or provided, or caused to be given or provided, or was accessory to the giving and providing, certain drink to or for certain persons, for the purpose of corruptly influencing such persons to give or refrain from giving their votes at such election, or on account of such persons having voted or refrained from voting or being about to vote or refrain from voting at such election.

The respondent craves leave to refer to the particulars numbered 2 and 3 of the schedule marked II. hereunto annexed, and further to the particulars set forth in the schedule marked III., and also hereunto annexed, all which particulars he craves leave to supplement by further facts and evidence at the trial of this petition.

7. The petitioner by his agents L.K. his son, and one J.N., wrongfully, unlawfully and corruptly induced one D.J., being a youth of eighteen years

of age, on the polling day to personate his deceased father, also named D.J. (in his lifetime registered as a voter No. 237) and to proceed to vote at the polling station at the Court-house in Stellenbosch, where the said D.J. did record a vote for the petitioner.

8. The respondent further says that some persons not at present certainly known did on the polling day and at Stellenbosch wrongfully and unlawfully record a vote under the No. 303 in the name of P.L., the fact being that no such person as P.L., other than P.C.L., also registered as No. 78 under the name of P.C., was entitled to vote, and that the said P.C.L., *alias* P.C., voted under the No. 78 in favour of the respondent and H . . . .

9. The respondent further says that upon a scrutiny of the votes by this Honourable Court there will be found a clear majority in his favour.

Wherefore the respondent prays that the petition may be dismissed with costs.

Petition to set aside an Election for want of a Candidate's Qualification.

In the Supreme Court, &c.

To the Judges of the Honourable the Supreme-Court of the Colony of the Cape of Good Hope.

The petition of J.W. of . . . .

Sheweth :—

1. That your petitioner resides at W . . . . and is there registered as voter No. for Parliamentary elections, and had a right as such voter to vote at a certain election recently held in compliance with the requirements of the law, and in accordance with the lawful proclamation in that behalf of His Excellency the Governor, to supply a vacancy in the representation of the North Western Electoral Province in the Legislative Council of the Cape of Good Hope caused by the death of the late Honourable H . . . .

2. One J.L. was nominated as a candidate at the said election to fill the said vacancy, and on the 13th day of . . . . the said L. was by proclamation No. of 19 declared by His Excellency the Governor to be duly elected a member of the Legislative Council of the Cape of Good Hope for the aforesaid Electoral Province, of which Council the said L. claims to be qualified and entitled to be a member.

3. By Section 33 of the Constitution Ordinance it is provided, *inter alia*, that no person shall be qualified to be elected a member of the said Council who shall not, while being the owner of immovable property within this Colony of the value of two thousand pounds or upwards, but unless mortgaged to the extent contemplated in the said section, be at the same time possessed of property, movable and immovable, within this Colony to the value of not less than four thousand pounds of sterling money over and above his just debts, to which Section and Section 64 of the said Ordinance your petitioner desires to refer your Honourable Court.

4. The said L. is possessed of certain immovable property within

this Colony of the value of £3,000, but the said property is mortgaged for the sum of £3,500, and he does not possess property movable and immovable within this Colony to the value of £4,000 sterling over and above his just debts.

5. By reason of the premises the said L. is not qualified to be elected as a member of the aforesaid Legislative Council.

6. Your petitioner is entitled by virtue of the provisions of Act No. 9 of 1883, more especially Section 3 thereof, to present this petition to your Honourable Court complaining of the want of qualification of the said L. to be elected.

Wherefore your petitioner prays that your Honourable Court may declare the election of the said J.L. to be null and void by reason of the want of qualification, and may decree that the said election shall be set aside accordingly, or may grant such other proper relief in the premises as to your Honourable Court may seem meet, together with the costs of this petition.

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